

B 2
STORAGE

Government
Publication



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114675226>



Labour
Relations Board

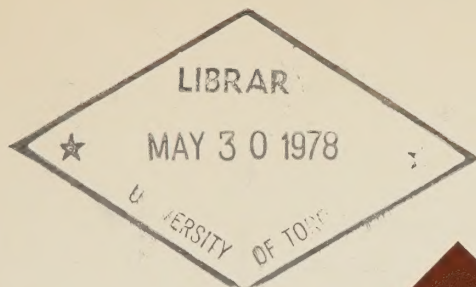
Ontario

20N

054

Decisions January 78

Copyright
Publication



4625



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
A. GRIBBEN
L. HEMSWORTH
A. HERSHKOVITZ
O. HODGES
F. KEAN
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
W.F. RUTHERFORD
H. SIMON
R. WHITE
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYNSLEY

Solicitor R.O. MACDOWELL

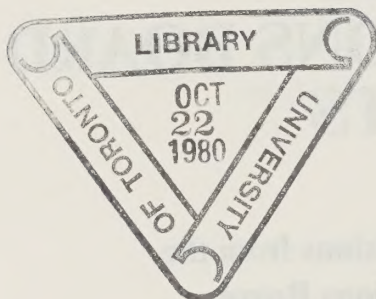
Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



CASES REPORTED

Aldershot Contractors Equipment Rental Ltd., Re Teamsters, Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America	61
Amor, Robin Albert, Re Union of Canadian Retail Employees, C.L.C.	26
Catalytic Enterprises Limited, Re Robert Young, John Young, And U.A. Local 663 of Plumbers, Pipefitters and Welders	7
Children's Aid Society of Metropolitan Toronto, Re The Staff Association of the Children's Aid Society of Metropolitan Toronto	98
Crenmar Services Limited, Re Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, And Group of Employees	48
Dad's Cookies Ltd., Re Frank Sarcinella And Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647	116
FAG Bearings Limited, Re Craig Stephen Kreider	76
Harding Carpets Limited, Collingwood, Ontario, Re Canadian Textile and Chemical Union, And Amalgamated Clothing and Textile Workers Union	46
Hillsdale Nursing Home, Re Shirley Lorraine Hawkins And Boot and Shoe Workers' Union	11
Montgomery Elevator Company Limited and National Elevator and Escalator Association (formerly Canadian Elevator Manufacturers Association), Re L. Harmel, E. Heitman and International Union of Elevator Constructors, Local 90	83
Nel-Gor Nursing Home, Re London and District Service Workers' Union, Local 220, S.E.I.U., AFL-CIO-CLC	52
Olympia & York Developments Limited, Re United Plant Guard Workers of America, Local 1962	64
Pal-O-Pak Manufacturing Company Limited, Re United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC	95
Professional Institute of Public Service Canada, The; Professional Institute of the Public Service of Canada, Re The Professional Institute of Staff Association	18
Reed Limited, Furniture Division, Re Canadian Union of Industrial Employees	1
Repac Construction & Materials Limited, Re Ontario Haulers Union And A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183, And International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230, And Labourers' International Union of North America, Local 183, And The Metropolitan Toronto Road Builders' Association	91

Robertson-Yates Corporation Limited, Frid Construction Co. Ltd. et al, Re Labourers' International Union of North America, Local 837, And Operative Plasterers' and Cement Masons' International Association, Local 298, And United Brotherhood of Carpenters and Joiners of America, Local 18, And Ontario Provincial Conference I.U.B.A.C.	30
Royce Enterprises, Re United Steelworkers of America	112
Sunnybrook Food Markets (Keele) Limited, Re Retail Clerks, Local 206, Chartered by the Retail Clerks International Association	107
Truck Engineering Limited, Re International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) Local 636	70
Western Fair Association, Re Service Employees' International Union, AFL-CIO-CLC ..	97
Windsor Arms Hotel Limited, Re Canadian Food and Associated Services Union	57
Winiker Industrial Auctioneers Ltd., Re United Electrical, Radio & Machine Workers of America (UE), Local 512	15
Zehrs Markets Division of Zehrmart Limited, Re The Retail Clerks International Association, And Diamond "Z" Association	86

INDEX OF CASES

Certification – Employee – Whether employee exercises managerial responsibilities	
RETAIL CLERKS, LOCAL 206, CHARTERED BY THE RETAIL CLERKS INTERNATIONAL ASSOCIATION v. SUNNYBROOK FOOD MARKETS (KEELE) LIMITED	107
Certification – Employee – Whether employee exercises managerial responsibilities	
UNITED STEELWORKERS OF AMERICA v. ROYCE ENTERPRISES	112
Certification – Employee – Whether watchman is a guard	
UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL-CIO-CLC v. PAL-O-PAK MANUFACTURING COMPANY LIMITED	95
Certification – Membership Evidence – Practice/Procedure – Whether allegation of irregularities must be resolved before vote is held	
CANADIAN TEXTILE AND CHEMICAL UNION v. HARDING CARPETS LIMITED, COLLINGWOOD, ONTARIO v. AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION	46
Certification – Membership Evidence – Representation vote – Whether organizing campaign prior to a raid involved misrepresentation – Effect on membership evidence and subsequent representation vote	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837 v. ROBERTSON-YATES CORPORATION LIMITED, FRID CONSTRUCTION CO. LTD., et al.	30
Certification – Membership Evidence – Whether conduct of organizing campaign raises doubts as to whether the membership evidence reflects the true wishes of employees	
TEAMSTERS UNION LOCAL 938 v. CRENMAR SERVICES LIMITED v. GROUP OF EMPLOYEES	48
Certification – Trade Union status – Effect of previous applications – Whether bar appropriate	
ONTARIO HAULERS UNION v. REPAC CONSTRUCTION & MATERIALS LIMITED v. A COUNCIL OF TRADE UNIONS ACTING AS THE REPRESENTATIVE AND AGENT OF TEAMSTERS' LOCAL 230 AND LABOURERS' INTERNATIONAL UNION LOCAL 138 v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 230 v. LABOURERS' INTERNATIONAL UNION LOCAL 138 v. THE METROPOLITAN TORONTO ROAD BUILDERS' ASSOCIATION	91
Discharge for Union Activity – S. 79 – Change in Working conditions – Whether failure of employer to maintain employee in a position for which she was over-qualified was motivated by anti-union animus or constituted an alteration of working conditions	
LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.I.E.U., AFL-CIO-CLC v. NEL-GOR CASTLE NURSING HOME	52

Discharge for Union Activity – S. 79 – Effect of employer termination of apprentice – Whether discrimination because of union activity – Appropriate remedy where aggrieved employees had no right to continued employment in any event CANADIAN FOOD AND ASSOCIATED SERVICES UNION v. WINDSOR ARMS HOTEL LIMITED	57
Discharge for Union Activity – S. 79 – Whether conduct on behalf of employee committee is union activity – Appropriate remedy where discharge motivated in part by union activity but reasonable cause for discharge also exists CRAIG STEPHEN KREIDER v. FAG BEARINGS LIMITED	76
Discharge for Union Activity – S. 79 – Whether discharges motivated by anti-union animus UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 1962 v. OLYMPIA & YORK DEVELOPMENTS LIMITED	64
Discharge for Union Activity – S. 79 – Whether indefinite lay off motivated by anti-union animus TEAMSTERS LOCAL 879 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA v. ALDRSHOT CONTRACTORS EQUIPMENT RENTAL LTD.	61
Duty of Fair Representation – S. 79 – Whether alleged waiver by union of grievor's seniority rights breaches duty ROBIN ALBERT AMOR v. UNION OF CANADIAN RETAIL EMPLOYEES, C.C.L.	26
Duty of Bargain in Good Faith – S. 79 – Effect of employer refusal to ratify agreement previously settled by its negotiating team THE PROFESSIONAL INSTITUTE STAFF ASSOCIATION v. THE PROFESSIONAL INSTITUTE OF PUBLIC SERVICE CANADA and THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA v. THE PROFESSIONAL INSTITUTE STAFF ASSOCIATION	18
Employee – Whether social work supervisors are managerial THE STAFF ASSOCIATION OF THE CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO v. CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO	98
Employees Health and Safety Act – Practice/Procedure – Whether employee required to resort to grievance procedure in collective agreement prior to filing complaint with the Board CANADIAN UNION OF INDUSTRIAL EMPLOYEES v. REED LIMITED, FURNITURE DIVISION	1
Employees Health and Safety Act – Whether employees required to work in unsafe conditions – Whether lay off a breach of Act ROBERT YOUNG; JOHN YOUNG v. CATALYTIC ENTERPRISES LIMITED v. U.A. LOCAL 663 OF PLUMBERS, PIPEFITTERS AND WELDERS	7

Practice/Procedure – Arbitration – S. 112a – Whether Board will adjourn proceedings at request of applicant union	
L. HARMEL, E. HEITMANN AND INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90 v. MONTGOMERY ELEVATOR COMPANY AND NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION	83
Practice/Procedure – S. 79 – Whether witness being cross-examined must be supplied in advance with particulars of questions relating to alleged improper conduct	
SERVICE EMPLOYEES’ INTERNATIONAL UNION, AFL-CIO-CLC v. WESTERN FAIR ASSOCIATION	97
S. 79 – Collective Agreement – Effect of employee impounding union funds because of allegedly unlawful strike – Whether justified in absence of arbitration award	
INTERNATIONAL UNION (U.A.W.) LOCAL 636 v. TRUCK ENGINEERING LIMITED	70
Sale of Business – Successor Status – Effect of distribution of business assets through an appointed receiver-manager – Effect of absence of transfer of goodwill	
UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), LOCAL 512 v. WINIKER INDUSTRIAL AUCTIONEERS LTD.	15
Successor Status – Effect of holding union meeting on Sunday – Whether merger defective	
THE RETAIL CLERKS INTERNATIONAL ASSOCIATION v. DIAMOND “Z” ASSOCIATION v. ZEHR’S MARKETS DIVISION OF ZEHRMART LIMITED .	86
Termination – Timeliness – Collective Agreement – Effect of Hospital Labour Disputes Arbitration Act on term of agreement which arbitrator can award – Effect of arbitrator making award which does not comply with Act – Whether arbitrator’s specification of term of operation of agreement is ineffective	
SHIRLEY LORRAINE HAWKINS v. BOOT AND SHOE WORKERS’ UNION v. HILLSDALE NURSING HOME	11
Termination – Timeliness – Effect of making term of operation of agreement retroactive – Whether prohibited by section 44 of the Act	
FRANK SARCINELLA v. MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION 647 v. DAD’S COOKIES LTD.	116

1296-77-U Canadian Union of Industrial Employees, (Complainant), v.
Reed Limited, Furniture Division, (Respondent).

Employees Health and Safety Act – Practice/Procedure – Whether employee required to resort to grievance procedure in collective agreement prior to filing complaint with the Board

BEFORE: Donald D. Carter, Chairman, and Board Members D.B. Archer and J.D. Bell.

APPEARANCES: *Brian Iler, Peter Dorfman and Michael Hurde for the complainant; D. Churchill-Smith, Q.C., L. Bertuzzi, W. Easdale and N. Mazin for the respondent.*

DECISION OF THE BOARD: January 19, 1978.

1. This is a complaint under section 9 of the *Employees Health and Safety Act*, 1976. The complainant union alleges that a number of employees were disciplined because they had acted in compliance with the Act.

2. The employees in question are represented by the complainant trade union for the purpose of collective bargaining, and currently work under a collective agreement negotiated by the union and the respondent employer. This collective agreement provides a grievance procedure and, as required by section 37 of the *Labour Relations Act*, an arbitration provision providing that all disputes arising out of the collective agreement be resolved through final and binding arbitration. The existence of the collective bargaining relationship in this case raises the broad question of the rights of organized employees to have access to the remedial provisions set out in section 9 of the *Employees Health and Safety Act*, 1976 (the Act). More specifically, what must be considered is the manner in which an employee represented by a trade union may bring a complaint, and to the extent to which that employee has access to these remedial provisions. Section 9 provides:

9. – (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss an employee;
- (b) discipline or suspend or threaten to discipline or suspend an employee;
- (c) impose any penalty upon an employee; or
- (d) intimidate or coerce an employee,

because the employee has acted in compliance with this Act.

(2) Where an employee complains that an employer has contravened subsection 1, the employee may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply *mutatis mutandis* to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection 2, and section 79 of *The Labour Relations Act*, except subsection 4a, applies *mutatis mutandis* as if such section, except subsection 4a, were enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, sections 91, 92, 95, 97 and 98 of *The Labour Relations Act* apply *mutatis mutandis*.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection 1 lies upon the employer or person acting on behalf of the employer.

3. Three preliminary objections to this complaint were raised by the respondent employer. First, it was argued that the complaint should not be dealt with by the Board, since it did not constitute a complaint under section 9(2) of the Act. According to the employer, the complaint as filed must be characterized as a union complaint and not as an employee complaint. Since the scheme of the Act contemplated only employee complaints, it followed from this characterization that the complaint was brought improperly and should be dismissed.

4. The second objection, argued in the alternative, was that the employees by having individual grievances filed on their behalf had elected arbitration under subsection (2) of section 9 and, hence, were precluded from pursuing further their complaint before this Board. The evidence, although not entirely clear, leads us to conclude that this complaint was filed with the Board before any of the individual grievances were lodged with the employer. It is clear, however, that the grievances had not been withdrawn at the time of the Board's hearing, and that they had not been processed beyond the first stage of the grievance procedure. The respondent employer argued that, in these circumstances, the employees had elected arbitration and must pursue that route exclusively.

5. Finally, the employer submitted that, even if no election had been made, the Board should defer to the arbitration process, as it had on certain occasions when dealing with complaints brought under the *Labour Relations Act* but also capable of being brought under the grievance and arbitration provisions of a collective agreement. In support of this proposition, counsel for the respondent cited *National Showcase Ltd.* (1960), 61 CLC ¶16,185; *Collingwood Shipyards*, [1967] OLRB Rep. July 376; *The Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427; and *The Ontario Municipal Employees Retirement Board*, [1976] OLRB Rep. Oct. 634. The case for deferral to arbitration, according to counsel, was even stronger where a complaint has been filed under the *Employees Health and Safety Act*, 1976, since the remedial provisions of that Act (section 9) expressly contemplated the availability of the alternative of arbitration.

6. This complaint assumed the form of most of the complaints that are brought under the general remedial section of the *Labour Relations Act*, section 79. Its style of cause named the Canadian Union of Industrial Workers as the complainant, and Reed Ltd., Furniture Division, as the respondent. Following the style of cause the complaint stated, "[t]he

complainant complains that the grievors named in paragraph 2 have been dealt with by the respondent contrary to the provisions of section 9(1) of the *Employees Health and Safety Act, 1976*, and request compensation for loss of wages suffered by the grievors due to the wrongful suspension of the grievors by the respondent". Paragraph 1, which followed, set out the name and address of both the complainant and the respondent, again referring to the union as being the complainant. In paragraph 2, there was set out a list of employees who were referred to as grievors, and in respect of whom it was indicated that addresses and telephone numbers were not available at that time.

7. Our reading of the Act, and especially section 9, is that the statute contemplates that any complaint brought under it must be in essence an employee complaint. A trade union, as bargaining agent for employees, is not the beneficiary of the substantive protections provided by subsection (1) of section 9. That section, by its clear wording, is intended to protect from employer recriminations employees who have acted in accordance with the procedures set out in the earlier sections of the Act. The remedial provision of the Act, subsection (2) of section 9, just as clearly refers only to complaints of employees. By contrast, the general remedial provision of the *Labour Relations Act*, section 79, permits a much wider range of complainants, referring to "any complaint alleging a contravention of the Act". The Act, therefore, must be interpreted as permitting only employee complaints. This interpretation, in our view, is clearly consistent with the thrust of the statute which, unlike the *Labour Relations Act*, is not collective bargaining legislation, but a statute concerned with the health and safety of employees at their place of work.

8. The conclusion that the Act contemplates only employee complaints, however, need not be fatal to the instant complaint. The question is whether the complaint as filed is something other than an employee complaint. The answer to this question must be determined by a close examination of the form in which this complaint was brought.

9. Under section 79 of the *Labour Relations Act*, where complaints are brought in the same form as this complaint, the Board has treated the complainant union as bringing the complaint on behalf of the individual employees named as grievors in the complaint. See *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197. A complaint brought in this manner is still regarded as an employee complaint, since control over the carriage of the complaint is considered to rest with the employee. As a consequence, the union, acting only as the agent of the individual grievor, does not have the power to veto a settlement reached between the named grievor and the respondent employer. See *Norak Steel Construction Ltd.*, [1968] OLRB Rep. Sept. 638. We see no reason to adopt a different approach when dealing with a complaint brought in the same manner under section 9 of the *Employees Health and Safety Act, 1976*. The union, although named as complainant, could only act as the agent of the named grievors, having no independent power to carry, or settle, the complaint. The complaint, therefore, would be in essence the complaint of the employee, and would be compatible with the scheme of the Act. We, therefore, are not prepared to dismiss the complaint on the basis of the first preliminary objection.

10. The problem of determining the manner in which an employee should choose between the remedial alternatives of arbitration or inquiry by the Board arises out of the second objection. Although the Act, section 9(2), clearly contemplates that the organized employee must make a choice between these two procedures of dispute resolution, it does not elaborate the form that such a choice should assume. The respondent employer argued that,

in this case, the employees by filing grievances had opted for arbitration under their collective agreement and were foreclosed from pursuing their complaint before the Board, even though it may have been filed first in time. In other words, recourse to the grievance procedure, even in the face of an earlier filing with the Board, signified the election of arbitration.

11. This argument, in our view, confuses the grievance procedure, the settlement procedure leading up to arbitration, with “final and binding settlement by arbitration under a collective agreement”. If reference is made to the *Labour Relations Act*, it can be seen that in the context of the collective bargaining statute these procedures are not equated. The section of that Act imposing the general requirement of arbitration of disputes arising out of collective agreements, section 37, contemplates the establishment of an adjudicative procedure, either before a board of arbitration or a single arbitrator. There is no suggestion in that section that the grievance procedure, essentially accommodative in nature, is a component of that mandatory, adjudicative procedure. Quite the contrary, the wording of the statutory arbitration provision set out in section 37(2) draws a clear distinction between the grievance procedure and arbitration, making arbitration available *only after any grievance procedure established by the collective agreement has been exhausted*. The same distribution is maintained in section 112a of the *Labour Relations Act*. This section, providing an alternative dispute resolution mechanism for arbitration of disputes arising out of construction industry collective agreements, refers to both the grievance and arbitration provisions in a collective agreement. If the grievance procedure were encompassed within the arbitration procedure, there would be no need to make a separate reference to the grievance procedure. The conclusion to be drawn is that the Legislature, when enacting the *Labour Relations Act*, considered that a distinction should be drawn between the grievance procedure and the process of arbitration.

12. The *Employees Health and Safety Act, 1976*, refers only to an election being made between “arbitration” and the statutory procedure administered by the Board. Did the Legislature, when referring to arbitration in this context, intend that the word be read in the same manner as it is in the *Labour Relations Act*? The choice of processes offered by section 9 appears to contemplate that special problems may arise when the *Employees Health and Safety Act, 1976*, is applied to employees employed under a collective bargaining relationship. In this light, it does not seem unreasonable to assume that the Legislature intended the term “arbitration” to have the same meaning as when used in the collective bargaining statute. The statutory language, in our view, calls for an election, not between recourse to the grievance procedure and the statutory procedure, but between recourse to the process of arbitration and the procedure administered by the Labour Relations Board.

13. To adopt the approach argued by the respondent would force an employee to forego the grievance procedure entirely in order to preserve the right of recourse to the statutory procedure. Such a development, in our view, would not be desirable from an industrial relations perspective. If there exists a grievance procedure, employees should be encouraged to utilize that process before pursuing the statutory procedure. The Board, therefore, should not foreclose an employee from bringing a complaint before it simply because that employee has had his union take the matter through the grievance procedure. Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

14. We recognize that this finding standing by itself would allow an employee to ride two horses up until the election is made. Such a possibility, in our opinion, is neither desirable, nor the intent of the Legislature. The choice of procedures provided by section 9(2) amounts to legislative recognition of the undesirability of having the same matter before two quite separate forums concurrently, since remedial concurrency suffers from the dual disadvantages of duplication and confusion.

15. The answer to this concern, however, is not a solution that would encourage employees to forego the grievance procedure completely as argued by counsel for the respondent. A much better answer is for the Board to exercise the discretion conferred upon it by section 9(3) of the Act by suspending any inquiry into the complaint until it is satisfied that an employee has made reasonable efforts to obtain a resolution of the matter through the grievance procedure. In adopting this approach, we recognize that it is the employee who has carriage of a complaint under section 9. Nevertheless, we consider it desirable that the employee first attempt to resolve the complaint by utilizing the grievance procedure set out in the collective agreement between that employee's union and the employer. Otherwise, there is a danger that complaints having collective bargaining implications for the union and the employer might never enter the grievance procedure. If the dispute remains unsettled, moreover, the requirement that the employee have initial recourse to the grievance procedure allows that employee a better opportunity to make a more informed choice of the procedure for the final resolution of the dispute.

16. The evidence in this case is that the employees have not carried the grievance beyond the first stage of the grievance procedure. It is evident, therefore, that the employees have not yet selected arbitration, although it is possible that they might do so upon completion of the grievance procedure. Counsel for the employees quite candidly admitted that the employees intended to preserve all possible options. Although this approach is quite understandable in light of the uncertainty as to the interpretation that the Board would give to this new remedial provision, it is clear to us that the employees were attempting to ride two horses at the same time. As we have already said, we do not consider that the Legislature intended that remedial procedures should operate concurrently. The Board is of the view, therefore, that this inquiry should be adjourned at least until such time as it is established that the employees have made reasonable efforts to exhaust the grievance procedure set out in their collective agreement.

17. The employer, however, argued that the Board should go even further by deferring to the arbitration process as well as the grievance procedure. Section 9(2), on its face, appears to provide to the employee two clear alternatives – arbitration or inquiry by the Board. This legislative approach is to be contrasted with that taken in the *Labour Relations Act* where two separate procedures are established, arbitration and the general remedial procedure under section 79, but not as alternatives. In other words, the *Labour Relations Act* does not expressly promise a choice of remedies but merely establishes two quite different dispute resolution procedures which, on occasion, may overlap. When dealing with situations where such overlap has occurred, the Board has adopted an approach of deferring to arbitration except when it can be established that the dispute has implications extending beyond the collective agreement or there exist special circumstances making arbitration inappropriate. See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49; *The Ontario Municipal Employees Retirement Board*, *supra*. The question is whether there is a legal and industrial relations basis for taking a similar approach to complaints under the *Employees Health and Safety Act*, 1976.

18. The language of the *Employees Health and Safety Act, 1976*, does not appear to support a general policy of deferral to arbitration. There is no suggestion in the language of the Act that arbitration should be pre-eminent but, rather, the clear inference to be drawn from the language is that the two procedures are treated as alternatives on an equal footing. Since it is difficult to conceive of situations where a complaint under section 9 could not also be framed as unjust dismissal or discipline contrary to the collective agreement, the Board, if it were to adopt a general policy of deferral to arbitration, would by an exercise of discretion virtually eliminate the choice of remedies clearly provided by the statute.

19. The reason for the Board's policy of deferral to arbitration when entertaining a complaint under the general remedial provision of the *Labour Relations Act* appears to be less appropriate when dealing with the complaints under the *Employees Health and Safety Act, 1976*. That rationale is set out in *National Showcase Co. Ltd.*, *supra*, at p. 902.

"It seems to us, therefore, in determining whether we should exercise our discretion under section 57, subsection 4 [now 79(4)], it is proper to take into account the fact that an alternate remedy exists. In addition, when this remedy is one which the parties themselves have agreed to and, further, involves a procedure under which the parties agree to attempt to settle the dispute themselves before bringing in an outsider, that is, an arbitrator, we have no hesitation in saying we ought not to proceed further under section 57, subsection 4."

20. There appears to be two considerations underlying this statement: first, an assumption that the parties to a complaint brought under the *Labour Relations Act* will be the same as the parties who have been bargaining for a grievance procedure and arbitration in a collective agreement; second, an assumption that arbitration, and especially the grievance procedure, are more suitable remedies. The first assumption does not flow easily from the *Employees Health and Safety Act, 1976*, since, as we have already held, a complaint must be an employee complaint. The employee, however, is not the bargaining agent; which has negotiated the grievance and arbitration provisions in the collective agreement and, according to the general thrust of arbitral jurisprudence, that employee cannot as a general rule carry a grievance through the arbitration process.

21. More important, in the context of a complaint relating to health and safety, there does not appear to be any justification for assuming that arbitration provides a better remedy to the employee. Although we have already held that it is appropriate for the Board to defer to the grievance procedure, our assumption that the grievance procedure provides a more suitable accommodative mechanism does not mean that we regard arbitration as the more suitable adjudicative forum. Although the facts on which they are based may be the same, a complaint brought under section 9 must be framed in a much different manner than a grievance being submitted to arbitration. The issue under the Act is whether an employer has dismissed, disciplined, or treated an employee in some other unfavourable manner because the employee has acted in compliance with the Act. At arbitration, the issue is likely to be whether an employee has been discharged or disciplined for cause, an issue that is surrounded by a complex arbitral jurisprudence. In our view, no general assumption can be made as to whether one forum is more suitable for the resolution of health and safety complaints than the other. The choice, as the Legislature clearly intended, must be made by the employee, and not by the Labour Relations Board.

22. Accordingly, for the reasons given above, the Board will adjourn this matter until such time as it is established both that the employees have made reasonable effort to exhaust the grievance procedure and that they have elected not to take the matter to arbitration.

1182-77-U Robert Young, John Young, (Complainants), v. Catalytic Enterprises Limited, (Respondent), v. U.A. Local 663 of Plumbers, Pipefitters and Welders, (Intervener).

Employees Health and Safety Act – Whether employees required to work in unsafe conditions – Whether layoff a breach of Act.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members Wm. F. Rutherford and W. H. Wightman.

APPEARANCES: *C.E. Hooper, R. Young and J. Young for the complainants; D.I. Wakely and T.J. Westley for the respondent; Henry M. Pollit and Harold J. Douglass for the intervener.*

DECISION OF VICE-CHAIRMAN E. NORRIS DAVIS, AND BOARD MEMBER Wm. F. RUTHERFORD: January 6, 1978.

1. The complainants allege that they have been dealt with by the respondent contrary to the provisions of section 9 of *The Employees' Health and Safety Act*.

2. At the hearing counsel for the respondent raised a preliminary objection that the pleadings were lacking in particularity and that its request for particulars had not been answered. Counsel argued that the respondent should be relieved of the procedural onus of "going first" in putting on its case. The complainants were not represented by counsel. The Board, in order to expedite the proceedings, agreed to relieve the respondent of the procedural onus.

3. The complainant, John Young, was employed as a welder by the respondent at Sarnia on the Petrosar project from May to October 7, 1977 at which time he, along with a number of others, was laid off. The other complainant, Robert Young, was employed as a pipefitter on the same project between July 29th and October 7, 1977 at which time he too was laid off. In the complaint filed with the Board, it is alleged that the respondent

"force us to work unsafely – i.e. no scaffolds, men work alone top of boiler. No way to clean safety glasses that had to be worn re Catalytic – forced to ride in truck in unsafe condition."

4. No evidence was presented in respect to the allegation of "being forced to work alone on top of the boiler" and the Board, therefore, makes no finding.

5. In respect to the allegation that there was no way to clean safety glasses, the evi-

dence was that it is the practice of the respondent to maintain locations at which is provided lens cleaning solvent and tissues. On one occasion the complainant, Robert Young, complained to his foreman, William Ferguson, who reported to the area foreman, Robert McNaughton, that there was no solvent and no tissue at a location. McNaughton contacted a Mr. Robert Knowles, who is employed as safety supervisor, drawing the deficiency to his attention. It must be noted that both Ferguson and McNaughton are members of the same union as the complainants and, in fact, are members of the bargaining unit and not representatives of management. It was testified that employees were required by Company policy to wear safety glasses (as is general in occupations such as this) and several witnesses testified that they had done similar work for a number of other employers and that this was the only job site which, in their experience, provided lens cleaning stations. It was further testified that there was no requirement on the employer, through safety codes or by statute, to provide such glass cleaning facilities. There was no evidence that the complainant either refused to work because of this deficiency or was directed to work. In the Board's view, where, as here, the condition is completely within the competency and ingenuity of the employee to take readily available alternative means (howbeit not so convenient) of accomplishing the objective and eliminating a condition, he is obliged so to do. It is the Board's opinion that the set of circumstances outlined cannot be considered as giving the complainant reasonable cause to believe that he was being required to work under unsafe conditions.

6. It was given in evidence that in order to facilitate movement of employees from one location to another on the site, the respondent supplied a van. It was testified that moves would not exceed one-eighth of a mile and that employees were not forced to use the facilities. On occasion the van may have been pre-empted by some other group, in which case a pick-up truck was used. Ferguson testified that on one occasion the complainant, Robert Young, said to him "you can't expect me to ride in the back of that, do you?". Ferguson's reply was, "I never asked you to ride in the back" and in fact Ferguson, Young and one other employee rode in the cab on that occasion.

7. A Mr. Ed DeCalver, a steamfitter, testified to a further occurrence involving the truck on a rainy night, making the back of the truck slippery and he asked the foreman if they couldn't get some benches to sit on. The foreman replied, "let's not rock the boat, we have a good thing going". DeCalver reported this to the area foreman, McNaughton, who asked DeCalver to "calm down and he would look into it". Three days later benches were built.

8. DeCalver also testified that he had complained about the lack of benches two or three times, including once to his steward, who he thinks was Robert Young. DeCalver was employed from August 22nd to October 12th, when he and seven others were laid off and testified that as far as he knew the issue of safety had nothing to do with his lay-off.

9. There was one other incident given in evidence as to the complainant's involvement in a potentially unsafe situation. As of August 1, 1977 a night shift was formed on the project and the two complainants were both assigned to that shift. The work required to be done by the night shift was indicated by a daily listing of jobs covering both day and night shifts and, in effect, comprised those jobs not previously completed by the day shift. One of the jobs on which the complainants were engaged, in early August, required the use of a scaffold. It appears that there was available a pre-fabricated scaffold which Robert Young pointed out to his foreman, Ferguson, would be impractical to use and since there were then

no carpenters assigned to the shift, a more adequate scaffold could not be built. Ferguson reported to the area foreman, McNaughton, who states, "once I looked at the job, I went back to the control room and refused the job because I considered it wasn't safe for them to build the scaffolding". The job was not done that night but was done on the succeeding day shift with a proper scaffold.

10. Both of the complainants testified that when McNaughton looked at the job he said "I know it is unsafe but I have to ask you to do it". McNaughton denies having said this either at that or any other time; Ferguson denies having heard McNaughton say that. In the total context of McNaughton's subsequent actions it is hardly likely that he would have uttered such words.

11. Between October 7th and October 12th there were thirty-four pipefitter employees laid off, including the two complainants. Between September 17th and September 23rd there had been an additional thirty-four pipefitter employees laid off. At the time of the hearing there were twenty-three pipefitters employed on the project as compared with a peak of 175. It is the complainants' contention that their lay-offs were related to their refusal to perform work under unsafe conditions. The complainants admit that no one ever told them that their lay-offs were so connected but they allude to a general atmosphere amongst foremen "not to rock the boat" as being predictive of disciplinary action where employees did "rock the boat" as the complainants, in their opinion, had done in regard to safety matters.

12. Based on the evidence we heard this is a long and fragile bow which the complainants seek to draw.

13. Evidence introduced by the respondent clearly demonstrates an over-riding concern for safe working conditions, including a published Safety Policy which includes the statement that "foremen who do not insist on safety will be replaced". The testimony of McNaughton and of Ferguson is consistent only with compliance with safe working conditions. This testimony was re-enforced by that of Robert Taylor, who was a steward on the job for five or six weeks and who states that in respect to safety matters he always "found McNaughton pretty co-operative with me".

14. It should also be noted that the record of safe performance by this employer on this project is outstanding and it stands number one out of twenty-two projects throughout the country. It should also be noted that counsel for the intervening union gave the official union evaluation of the Company's safety performance as "exemplary". Under all these circumstances it would be hard to believe that the respondent was one who considered the introduction of a safety matter was to be regarded as "rocking the boat".

15. The complainants also contend that the mere act of inclusion on the work list of jobs which are subsequently determined to be unsafe to perform, justifies a conclusion being drawn that the respondent is seeking to enforce unsafe working conditions. In the light of the evidence we find this contention to be completely without merit.

16. The evidence established that the lay-offs of October 7th and October 12th were the result of the client's (Petrosar) direction to the respondent to reduce the work force by a specific number of welders and pipefitters. Mr. Harry Brown, financial secretary of the un-

ion and the general foreman to whom McNaughton reports, was called as a witness by the complainants. Brown testified that he consulted with Mr. Diekman, the project superintendent, and was directed to cut the night shift on October 7th by five people. This he did by consideration of the qualifications of employees for the remaining jobs as well as with what knowledge he had of jobs on other projects where people could be placed. Brown states that the same considerations were applied to all employees laid off and there were no special considerations applicable to the Youngs.

17. The evidentiary onus in this case lies on the respondent to establish that it did not contravene section 9(1) of the Act.

18. The evidence does not clearly establish that the incidents recounted constitute an exercise by the complainants of the right conferred by section 2 of the Act to refuse to work where there is "reasonable cause to believe ... that a work place is unsafe for him to work in ...". Certainly the "lens cleaning" episode and the "truck" episode tend more towards employee convenience in the work environment than towards an unsafe working place, and it is the "unsafe working place" which is the ill sought to be cured by the legislation.

19. The "scaffolding" episode is of a different quality, in that, had the employees been required to construct a scaffold, all the evidence was that working with the constructed scaffold would have set up a working place which would have been unsafe for employees to work in. In fact, the scaffold was not constructed, no direction was even given to have the scaffold constructed and the work was not done. Whether this type of discussion about alternative methods should be categorized as a "refusal" is a question which we will not deal with here.

20. Even assuming that the outlined events constituted the exercise of a right conferred by section 2, is there a linkage between these events and the lay-off of the complainants such as contravenes section 9(1) of the Act. The Board finds that the subsequent lay-off of the complainants was effected solely in response to the client's demand for a reduction in specific craft hours to be assigned to the project. The Board further finds that the selection of employees for lay-off was conducted in what was the normal format and was uninfluenced by any of the prior safety events involving the complainants.

21. The complaint is dismissed.

DECISION OF BOARD MEMBER W.H. WIGHTMAN:

1. While concurring in the decisions regarding Board file numbers 1147-77-U and 1182-77-U, I feel the cases should not be dismissed without comment aimed at discouraging such frivolous complainants.

2. From the evidence before us it was clear that in the first case (No. 1147-77-U) the union had done all it could, and should have been expected to do, on behalf of the complainants. In the second case (No. 1182-77-U) it was abundantly evident that on any occasion when the complainants indicated they believed work at hand to be unsafe they were not required to do the work and that this was consistent with company safety policy which counsel for the union characterized in highly complimentary terms during the course of his summation.

3. Nevertheless, the union, under section 60 of *The Labour Relations Act*, and the company, under section 9 of *The Employees' Health and Safety Act*, were both vulnerable along with the Board to the time and costs associated with a day-long hearing which involved union counsel and a representative, company counsel and two representatives, seven potential witnesses under subpoena, as well as the complainants, the panel of the Board and the clerk.

4. Quite apart from the time and costs involved for the union, the company, and the complainants, this type of hearing represents a considerable cost to the Ontario taxpayer with nothing more being accomplished than the airing of baseless complaints.

5. If the union and company cannot be protected from vulnerability under the previously referred to provisions of these two Acts, I would hope that means could be found to save the Board, and hence, the taxpayer, from time and costs involved in such proceedings which make no possible contribution to improved union-management-employee relations in Ontario.

1357-77-R Shirley Lorraine Hawkins, (Applicant), v. Boot and Shoe Workers' Union, (Respondent), v. **Hillsdale Nursing Home**, (Intervener).

Termination – Timeliness – Collective Agreement – Effect of Hospital Labour Disputes Arbitration Act on term of agreement which arbitrator can award – Effect of arbitrator making award which does not comply with Act – Whether arbitrator's specification of term of operation of agreement is ineffective.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: Neil R.H. Burgess, June Gillespie and Shirley Hawkins for the applicant; Clifford Evans for the respondent; Donald J. McKillop, Q.C. and John Freeborn for the intervener.

DECISION OF THE BOARD: January 20, 1978.

1. This is an application under section 49 of *The Labour Relations Act* for a declaration that the respondent union no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. At the outset of the hearing the union's representative objected to the timeliness of this termination application. To determine whether the application is timely, the Board must look to the provisions of *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c.208, as amended by 1972, c.152 (hereinafter referred to as *H.L.D.A. Act*).

3. Section 49(2)(a) of *The Labour Relations Act* provides that in the case of a collective agreement for a term of not more than three years a termination application may be

brought only after the commencement of the last two months of its operation. The critical consideration in the instant application is to pinpoint the onset of the last two months of the collective agreement in effect between the parties. The union was certified as the bargaining agent of the employees in the bargaining unit in question on September 17, 1976. The parties were subsequently unable to conclude a collective agreement and the matter was ultimately referred to an arbitrator under the provisions of the *H.L.D.A. Act*.

4. The following sections of the *H.L.D.A. Act* are relevant in determining the duration of the collective agreement now in effect between the parties:

6-(1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties ...

7-(5) *Within five days* of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) *If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection 5, the parties or either of them shall notify the chairman of the board in writing forthwith, and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.*

(7) *If the parties or either of them fail to execute the document prepared by the Board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under The Labour Relations Act.*

(8) Except in arbitrations under section 5b [not relevant to this case] *the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties. ...*

(10) *Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties shall remain in force for a period of one year from the effective date of the document. ...*

(13) In making its decision upon matters in dispute between the parties, *the board of arbitration may provide,*

(a) where notice was given under section 13 of *The Labour Relations*

Act, that any of the terms of the agreement *except its term of operation* shall be retroactive to such day as the board may fix, but not earlier than the day upon which such notice was given.

(emphasis added)

Section 44 of *The Labour Relations Act* provides as follows:

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement *other than a provision relating to its term of operation*.

(emphasis added)

5. On October 25, 1977 the chairman of the board of arbitration released to the parties its award dated August 8, 1977 which was already in the form of a collective agreement. The chairman provided in his award that the term of operation was to be *retroactive* to the first day of January, 1977 and to continue until midnight on the 31st day of December, 1977.

6. Within five days from the release of the award the union signed the collective agreement and on November 1, 1977, approached the employer to do the same. At that time the employer had not yet received its copy of the award and refused to sign the document.

7. On November 3, 1977, Mr. Ian E. Reilly wrote to the chairman of the board of arbitration on behalf of the union complaining that the employer had refused to sign the agreement within the five day period set out in section 7(5) of the *H.L.D.A. Act*. On November 21, 1977, the chairman of the board replied to Mr. Reilly with the following letter:

I have been informed that the parties to the above Arbitration have failed to execute a document giving effect to the decision of the Board of Arbitration herein.

I am enclosing herewith a document in the form of a Collective Agreement giving effect to such decision.

You are hereby notified that if such document is not executed by both parties within five days of its submission to you the document will go into effect and constitute a Collective Agreement as set out.

8. On or after November 14, 1977, the union signed the collective agreement and sent it to the employer for its signature. On November 29, 1977, counsel for the employer released a signed copy of the agreement on behalf of the employer. Because this collective agreement was not executed by both parties within five days from its submission to the parties, it came into effect automatically under the terms of section 7(7) of the *H.L.D.A. Act* on November 25, 1977. By the combined terms of section 7(8) and 7(10) of the *H.L.D.A. Act*,

the effective date of that agreement is the original date of the award of the board of arbitration, that is, August 8, 1977, and its term of operation is one year from that date or through August 7, 1978. The retroactive term of operation established by the board of arbitration is ineffective. Although section 7(13) of the *H.L.D.A. Act* enables the board to establish retroactive terms in the agreement, it specifically precludes the board from setting a retroactive term of operation.

9. Counsel for the employer does not dispute that under section 7(7) of the *H.L.D.A. Act* the document prepared by the board of arbitration in the form of a collective agreement came into effect as though it had been executed by the parties on November 26, 1977 and that the document constituted a collective agreement under *The Labour Relations Act*. Counsel argues, however, that the collective agreement which came into effect by the operation of section 7(7) of the *H.L.D.A. Act* was modified by mutual consent when the parties subsequently signed the agreement. Specifically, as this argument relates to the duration clause, counsel's position is that even if section 7(8) of the *H.L.D.A. Act* set the effective date of the collective agreement as the date of the board of arbitration's decision, this effective date was subsequently modified by mutual consent by the subsequent signing on November 29, 1977 of a collective agreement containing a retroactive effective date of January 1, 1977. In other words, counsel argued that the provisions of the *H.L.D.A. Act* setting the effective date of the document only apply where the parties do not subsequently sign a collective agreement. He contends that as soon as the parties sign a collective agreement, the provisions of the *H.L.D.A. Act* relating to the duration of the agreement are superseded by the actual duration clause provided for in the subsequently signed collective agreement.

10. Having regard to the provisions of the *H.L.D.A. Act* and *The Labour Relations Act*, the Board is unable to accept these submissions. Section 44(5) of *The Labour Relations Act* provides that while the parties may, by mutual consent, revise any provisions of their collective agreement it prohibits the alteration, even by mutual consent, of a provision relating to its term of operation except with the consent of the Board on the joint application of the parties [see section 44(3)]. As no such application has been made in this case, section 44(5) operates to prevent the parties from altering the term of operation established by the joint operation of section 7(8) and section 7(10) of the *H.L.D.A. Act*.

11. The Board finds, therefore, that the term of operation of the collective agreement in force between the parties is from August 8, 1977 to August 7, 1978 and not from January 1, 1976 to December 31, 1977. Pursuant to the provisions of section 49 of *The Labour Relations Act* the employees may only apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit during the last two months of the operation of the collective agreement, i.e., between June 7th and August 7th, 1978.

12. For the reasons given above, therefore, the instant application is untimely and hereby dismissed.

1257-77-R United Electrical, Radio & Machine Workers of America, (UE), Local 512, (Applicant), v. **Winiker Industrial Auctioneers Ltd.**, (Respondent).

Sale of a Business – Successor Status – Effect of distribution of business assets through an appointed receiver-manager – Effect of absence of transfer of goodwill.

BEFORE: Arthur Haladner, Vice-Chairman and Board Members O. Hodges and W.H. Wightman.

APPEARANCES: *V.B. Bjarnason and Al Peters for the applicant; D.K. Gray and T. Winiker for the respondent.*

DECISION OF THE BOARD: January 20, 1978.

1. The name “United Electrical, Radio & Machine Workers of America, (UE)” appearing in the style of cause of this application as the name of the applicant is amended to read “United Electrical, Radio & Machine Workers of America, (UE), Local 512” and the name “Radio Speakers of Canada Limited (bought by “a group of business men headed by Tom Winiker and Walt Kukurudga”.)” appearing in the style of cause of this application as the name of the respondent is amended to read “Winiker Industrial Auctioneers Ltd.”

2. This is an application brought under section 55 of The Labour Relations Act alleging a sale of the business of Radio Speakers of Canada Limited (Radio) to Winiker Industrial Auctioneers Ltd. (the respondent). United Electrical, Radio & Machine Workers of America (UE), Local 512 (the applicant) is seeking a declaration that the respondent is bound by the collective agreement between itself and Radio, effective June 1, 1977 to May 31, 1979. Counsel for the respondent contends that a sale of a business, within the meaning of section 55 of the Act, has not taken place and that the applicant is, therefore, not entitled to the relief sought. Its position is that there has been only a sale of the assets of the business by a receiver, and not a sale of the business itself.

3. On August 31, 1977, Peat Marwick Limited was appointed as receiver and manager of Radio, a company engaged in the manufacture and sale of audio speakers. During the period of the receivership – two months – Peat Marwick maintained operations in a going-concern condition. On October 24th, the respondent, a company headed by Tom Winiker, responded to a sale by tender invitation with an offer to purchase the majority of Radio’s assets, excluding the accounts receivable. These assets included Radio’s inventory of finished goods (audio speakers and enclosures), work in-progress, raw materials, laboratory, test and office equipment located at 221 Norseman Street and 37 Hanna Avenue, the company’s two production facilities. In addition, the respondent purchased, as part of the tender package, the stamping dies of Cornell Engineering Company Limited. These dies are used to produce audio speakers. Winiker also acquired the long term leasehold interest in the Norseman property. The Hanna lease was not purchased. However, as of December 2, 1977, the date of the Board’s hearing into this matter, the respondent was attempting to obtain an extension of that lease, which was to expire on December 15th.

4. There was no specific sale of goodwill, as that term is commonly understood. As stated, the accounts receivable were not acquired. Nor was there a sale of existing contracts or customer lists. Mr. Winiker testified, however, that the respondent is the major liquidator

for hi fi and sound system bankruptcies, and that it is familiar with all the companies in the field. There was, moreover, no evidence that the respondent has sold audio equipment to customers other than those listed on Radio's accounts receivable list, a list which was provided to the respondent for inspection as a prospective tenderer. Although Mr. Winiker testified that he did not derive any significant benefit from the inspection of this list, he gave evidence that he was approached, following the transaction in question, by three of the former customers of Radio; that he has sold audio speakers to one; and that he is currently negotiating with another. Mr. Winiker also gave evidence that he approached Yorkville Sound, the largest account of Radio, but that Yorkville is committed to Marsland Engineering, another audio speaker manufacturer, for the next six months. Mr. Winiker told the Board that his intention is to enter into competition with Marsland for the large audio speaker market.

5. During the twelve-month period preceding the receivership, Radio's work force fluctuated from a low of approximately twenty-five to a high of approximately fifty employees. The company employed twenty-six employees during the month of September. In October, the employee complement was increased to forty-six in order to use up inventory. Following the transaction which the applicant alleges constitutes a sale of a business within the meaning of section 55, the production facilities at Norseman and Hanna were shut down for one day and then reopened. At the present time, there are approximately twenty-five employees working in the two plants. Of these, all are former employees of Radio. The employees are receiving the same wages as they were receiving prior to the sale. However, the respondent has refused to deduct and remit dues to the union as required by the terms of the collective agreement. These dues were deducted and remitted by Peat Marwick during the receivership.

6. As of the date of the Board's hearing into this matter, the respondent was producing the same products as its predecessor – audio speakers and enclosures. Mr. Winiker gave evidence that his company will continue to produce audio speakers, but that it is planning to change the focus of production from the smaller raw speakers manufactured by Radio to the larger hi fi type and to move heavily into the production of hi fi enclosures, a product produced by Radio only in limited quantities. Mr. Winiker did not contend, nor was there any evidence, that these changes, if implemented, would result in a change in the nature of the work requirements of the employees, most of whom are unskilled.

7. Section 55 of *The Labour Relations Act* requires that where a business, or part thereof, is sold, leased, transferred, or otherwise disposed of, the successor employer receives it subject to the collective bargaining obligations of its predecessor. Section 55(2), the section which deals with the disposition of the business of an employer who is bound by a collective agreement, states:

“Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the

purposes of the application as if he were named as the employer in the application.”

8. The Board, having regard to the purpose of section 55, which is to provide permanence to established bargaining rights, has held that the crucial condition necessary to trigger the operation of section 55 is that there be a continuation of the business, and that it makes no difference whether the business has been transferred directly from the employer named in the collective agreement (or for which the union holds bargaining rights) or whether it has been transferred through a receiver, or some other intermediary (see *Marvel Jewellery Limited and Danbury Sales Ltd.*, [1975] OLRB Rep. Sept. 733; *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691).

9. In support of his contention that there has not been a continuation of the business of Radio by the respondent, counsel placed stress upon the fact that there has not been a sale of goodwill. The absence of goodwill in the sale is evidence, counsel says, that there has not been a section 55 disposition. The presence of goodwill in a transaction is often an important indicator that a sale, or other disposition, within the meaning of section 55, has occurred. It is not necessary, however, that there be a transfer of goodwill in order to find a section 55 disposition. The presence or absence of goodwill in a transaction is only significant to the extent it helps to resolve the more fundamental question of whether or not there has been a continuation of the business (see *Culverhouse*, *supra*; *Hughes Boatworks Inc.*, Board File No. 0655-77-R, December, 1977; and *Zehrs Markets Limited*, [1974] OLRB Rep. May 331).

10. As the jurisprudence makes clear, the most important factor considered by the Board in section 55 cases is the nature of the work performed. If the work performed subsequent to the transaction is not substantially different from the work performed before, this will normally result in a finding by the Board that there has been a continuation of the business.

11. The evidence in this case is that the business has continued to operate after the sale, and that it has continued to operate in virtually the same manner as before. The same products are being produced, by the same employees, using the same production facilities and equipment. Although there was no purchase of accounts receivable, customer lists or the other intangibles normally embraced by the term goodwill, the evidence is that the business has continued to serve the same customers, although it would appear that it is presently serving fewer. Although Mr. Winiker stated that he plans to produce hi fi speakers in addition to the raw speakers produced by Radio, and to place greater emphasis upon the production of hi fi enclosures, there was no allegation or evidence that this would result in a change in the work requirements of the employees. In the circumstances, the absence of a transfer of goodwill cannot negate the conclusion that the transaction in question has resulted in a continuation of the business, particularly in view of the respondent's knowledge and familiarity with the audio products markets. To the extent that goodwill existed at the time of the sale, it would appear that the respondent had no need of such goodwill in order to continue the business as a going concern.

12. Reference was made to *Dufferin Steel Co., Awico Division*, [1976] OLRB Rep. March 81. In that case, the Board held that the business of the predecessor employer, which was also in receivership at the time of the transaction in question, had not been sold within

the meaning of section 55, notwithstanding the acquisition by the respondent of the name, production equipment and premises used by the predecessor and the retention of the majority of the predecessor's employees. The situation here is clearly distinguishable from that which obtained in *Dufferin Steel*. There, the evidence established that the work performed subsequent to the transaction – the production of plate – was substantially different from the work performed before – the production of ornamental iron and miscellaneous steel – and that an application had been made to the provincial Government to commence a training programme in order to upgrade the skills of the employees so that they could perform the more sophisticated work of the respondent. Moreover, the respondent did not produce, or otherwise acquire, the raw materials or inventory of the predecessor, a fact which lent credence to its contention that it had no intention of continuing in the ornamental iron and miscellaneous steel business. Further, the respondent made no effort to cultivate the primary markets of the predecessor or to maintain its customers.

13. For the foregoing reasons, the Board finds that there has been a sale of a business within the meaning of section 55 of *The Labour Relations Act*. Accordingly, we declare that Winiker Industrial Auctioneers Ltd. is bound by the collective agreement between Radio Speakers of Canada Limited and United Electrical, Radio & Machine Workers of America, (UE), Local 512.

1004-77-U The Professional Institute Staff Association, (Complainant), v. The Professional Institute of Public Service Canada, (Respondent).

and

1074-77-U The Professional Institute of the Public Service of Canada, (Complainant), v. The Professional Institute Staff Association, (Respondent).

Duty to Bargain in Good Faith – S79 – Effect of employer refusal to ratify agreement previously settled by its negotiating team.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and C.G. Bourne.

APPEARANCES: *Denis E. Coupland, Muriel I. Wexler, Lorraine Neville and Colleen Hortie-Nugent for the Professional Institute Staff Association; John D. Richard, Q.C. and Lynn Harnden for The Professional Institute of the Public Service of Canada.*

DECISION OF THE BOARD: January 25, 1978.

1. The Board directs that the above complaints be and the same are hereby consolidated.

2. The Board hereby affirms its oral decision given at the conclusion of the hearing in this matter dismissing the application brought by the Professional Institute of the Public Service of Canada (Board File No. 1074-77-U) under Section 79 of the Act alleging that P.I.S.A. has violated Sections 14 and 61 of the Act.

3. Turning to the Section 79 complaint filed by P.I.S.A. alleging violation by the Professional Institute of Sections 14 of the Act (Board File No. 1004-77-U). This complaint arose out of the negotiations for a renewal to a collective agreement between the parties which expired on July 31, 1976. The evidence as it relates to this matter can be summarized as follows. Mr. Denis Coupland, the president of the Professional Institute Staff Association advised Mr. J.C. Ruffo, the Chairman of the Professional Institute negotiating team, by letter dated July 22, 1976 of the desire of P.I.S.A. to bargain for a renewal to the agreement which was to expire on July 31, 1976. The proposed amendments which were filed with the letter of July 22, 1976 made no reference to pension improvements. Mr. Coupland by letter of the previous day had informed Mr. Ruffo that formal pension proposals would be made following receipt of the information requested in his letter of July 21. Mr. Ruffo in his evidence acknowledged receipt of both letters. He replied to Mr. Coupland by letter of September 16, 1977 enclosing a copy of the amendments proposed by the employer which included mandatory retirement at age 65 and the discontinuance of the long service annuity plan for persons hired after June 12, 1976.

4. On November 30, 1976 the parties entered into a memorandum of understanding in respect of all issues in dispute exclusive of those relating to the pension plan (Articles 26 and 27). The issues in dispute as related to the pension plan included the proposals of the employer as set out above and the union's desire for pension indexation beyond the maximum 2% per year then provided. The memorandum states in part:

“... On conclusion of negotiations on these two articles, the amendments will be incorporated into a collective agreement covering the period from August 1, 1976 to July 31, 1977.”

P.I.S.A. does not contend that the memorandum of November 30, 1976, absent a settlement to the pension issue, constitutes a collective agreement.

5. The parties continued informal discussions on the matter of pensions and on May 3, 1977 resumed bargaining. The evidence establishes that Mr. Ruffo indicated to the union that he would be seeking approval from the Board of Directors of the Institute to make a further pension proposal and the union in turn indicated that if the indexing formula was satisfactory it would agree to the employer's proposals with respect to mandatory retirement at age 65 and the discontinuance of the long service annuity for new employees and in addition would consider increasing the employee contribution to the plan to 8% from the existing 7%. Mr. Ruffo met with the Board of Directors on June 11 and the minutes of that meeting were put in evidence before this Board. The Minutes show Mr. Ruffo moved that the negotiating team be allowed to negotiate within maximum escalation of 8% but an amendment was moved and seconded by Mr. Ruffo, that “negotiations be on the basis of a 50-50 split of additional costs but that the negotiating team not be limited to the 50-50 formula.” Mr. Ruffo met with the union on June 15 and proposed 8% annual cost of living escalation with the additional costs to be equally shared by the parties. The employer's proposal in this regard would have required an additional 3¼% of employee contributions for a total employee contribution of 10¼%. Mr. Coupland, representing P.I.S.A., rejected this proposal and suggested instead that the employee contribution be increased by 1%. Mr. Ruffo agreed and a memorandum was entered into.

6. The handwritten memorandum, dated June 16, 1977 and signed by Mr. Ruffo and Mr. Coupland, provides as follows:

“Items Outstanding

(1) Superannuation

8% Escalation Clause

– Increase Employees’ contribution from 7% to 8%.

(2) Retirement

26.05 – as proposed by Institute
mandatory at age 65.

(3) Long Service annuity plan

27.01 (vii) – to be continued for continuing employees on staff as of signing date of agreement.”

7. On June 17 Mr. Coupland took a typed copy of the memorandum to Mr. G.L. Mosley, the Executive Director of the Professional Institute for his signature. Mr. Mosley who had not been present at the meeting between Mr. Coupland and Mr. Ruffo the previous day, refused to sign it. Mr. Mosley testified that the Board of Directors had made it clear that July 31, 1976 was to be the date as of which the long service annuity was to be discontinued for new hires and not the signing date of the agreement which would have been sometime in July or August, 1977. Mr. Ruffo admitted in cross-examination that he had exceeded his authority in going beyond the July 31, 1976 cut-off date for the long service annuity. The memorandum signed by Messrs. Coupland and Ruffo on June 15 was put before the Institute Board of Directors on July 16, 1977. The by-laws of the Institute require that matters such as this be ratified by the Board of Directors and it has been the practice of the Institute Board of Directors to ratify memorandums of settlement entered into with P.I.S.A. Mr. Coupland admitted it was his understanding when he signed the memorandum on behalf of P.I.S.A. that it was subject to ratification by both sides.

8. The minutes of the Board meeting of July 16, 1977 were placed in evidence. The minutes as they relate to the June 15 Memorandum of Settlement are set out below:

“84.3 *Letter of Understanding – PISA – B7/10*: Parent *moved* that the Board of Directors not consider signing this letter of understanding until such time as the matter of the dates of the Long Service Annuity was resolved. Seconded Doyle-Rodrigue.

Burla *moved an amendment* that all changes submitted by PISA in Articles 26 and 27 in their collective agreement be rejected and that a careful wording of the remaining clauses be studied to see if they needed changing before signing. He requested Parent to consider this motion in place of his. Parent referred to the Executive Committee memo and felt his motion covered all points – the Committee had agreed on the date of July 31, 1976, and was against signing the letter of understanding. Burla pointed out that the Executive Committee was

opposed to Article 27 and he quoted figures showing the liability which would be assumed by the Institute as astronomical.

After discussion Parent read the letter from Ruffo, the Chairman of the Bargaining Team, in which he requested the Committee to decide on the date and indicating he assumed his task was now completed.

Parent's motion carried

Donegani queried if the Executive Committee had the authority to appoint a new Chairman for the Negotiating Team should the need arise. It was agreed the Executive Committee could take action if required but it would be discussed first with the current chairman to determine his intent.

Burla moved that all changes submitted by PISA under Articles 26 and 27 of their collective agreement or submitted in their Letter of Understanding of June 21, 1977, be rejected and that a careful wording of the remaining clauses within Articles 26 and 27 be studied and if needed, to be changed before signing. This would be the Institute's final offer. Seconded by O'Brien.

Parent felt the motion was redundant. Hutton questioned if only one item was outstanding or were there two? It was pointed out Article 26 had been signed in the PIREA agreement and the motion was to reject the changes made and ask for reconsideration. Burla pointed out that Parent's motion had dealt strictly with the date. Parent stated that a tentative agreement had been negotiated and the only contentious item was the date; the superannuation was within the mandate given by the Board. Burla stated the Board had agreed to negotiating an escalation clause to 8% on a 50-50 share cost basis but it had resulted in the employee contribution being 1% and this placed a heavy monetary burden on the Institute over the next 15 years and was nowhere near a 50-50 split.

After further discussion O'Brien requested that the contract for the staff, when signed, be circulated to the membership. It was pointed out that Article 26 had already been signed for the PIREA contract and age 65 was Ontario law for retirement. Burla stressed the whole document should be examined and if no changes were required in 26 then none would be made.

Burla's motion carried

(13 in favour; 4 opposed; 1 abstention)

Burla *moved* that no action by the Board be undertaken with the staff associations without the help of outside expertise in industrial relations and labour law in order that we may be in a position to understand the following:

- a) the profits entered into by contract or otherwise and the ways and means to come out of it, either immediately within short range, or at least in the long range;
- b) that this expertise be presented to the Board in opportune time for information or decision making;
- c) that such consultants be our negotiators with the staff associations with support from assigned excluded employees of the PI
- d) that funds be made available to the Executive Committee by the Board to hire the necessary expertise since the staff associations have or are about to serve notice to bargain.

Seconded by Donegani.

Parent stated he believed the funds were available.

Donegani in speaking for the motion felt that the Board was spending too much time as employer in dealing with staff problems without the required expertise. This was detrimental to the service to the members.

Kupar wished to add an amendment if Burla agreed that the duty of negotiator of the staff would be one of the duties of the CCN when employed and that the arrangement Burla proposed not to establish permanently. Burla stated this was not one of the duties of the CCN and he felt we needed outside assistance with support from inside.

Burla's motion carried. (1 opposed; 2 abstentions)

It was clarified that the Executive Committee would continue negotiations with the staff without returning to the Board and this would be the final offer of the Institute, made by the Executive Committee."

9. Following the failure of the Board of Directors to ratify the June 16 memorandum Mr. Ruffo resigned as chairman of the Institute's negotiating team and was replaced by Mr. Burla. Mr. Ruffo testified that he had expected the ratification to be a "rubber stamping". A further negotiation meeting was called for August 23, 1977 at which Mr. Burla tabled a "final position". The offer tabled by Mr. Burla contained no provision for improved escalation. The offer is set out in a letter from Mr. Burla to Mr. Coupland dated August 24, 1977; the day following the resumption of bargaining. It reads

"Subject – *Final Offer – P.I.S.A. 1976-1977*
Collective Agreement with Professional Institute

Following the meeting held on August 23, 1977, at Institute headquarters, attended by the Executive of PISA (with the exception of Mr. A.V. Hall), I wish to reaffirm the position of the Professional Institute regarding the above stated subject. The Institute's position was clearly stated at the meeting and remains as hereunder.

The Professional Institute finds unacceptable the PISA demands contained in the proposed amendments to Articles 26 and 27 of the present Agreement.

The Professional Institute agrees

'to continue the long service annuity plan for those continuing employees on staff as of August 3, 1976.'

The Professional Institute has agreed to this clause with P.I.R.E.A."

(P.I.R.E.A. is the bargaining agent for the regional field staff of the Institute.)

10. Negotiations were broken off on August 23rd. P.I.S.A. appealed directly to the members of the Institute in an attempt to alter the Institute's bargaining stance and also filed the complaint which is presently before the Board. In turn the Institute filed a complaint against P.I.S.A. because of its direct appeal to the Institute's members. This complaint was dismissed by the Board in its oral decision of December 19, 1977 as confirmed in paragraph 2 herein. There were no further attempts made by either side to continue the bargaining. At the suggestion of the Board on October 18, 1977, the first day of hearing in this matter, the union, with the concurrence of the employer, made application for conciliation services and negotiations were resumed under the auspices of a conciliation officer. The conciliation officer was unsuccessful in his endeavours to bring about a settlement of the outstanding differences between the parties and a "no board" report was handed down on November 18, 1977 thereby placing the parties in a legal strike/lockout position as of December 5, 1977. Neither party has as yet resorted to economic sanctions.

11. The union alleges that the failure of the Institute to ratify the June 15 memorandum and its tabling of a final offer which did not provide for increased pension escalation, taken individually or together, constitute violations of Section 14 of the Act. Section 14 provides:

"The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement."

The essence of the duty as set out in Section 14 of the Act is capsulized in *Devilbiss (Canada) Limited*, [1976] OLRB Rep. March 49 wherein it is stated:

"The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive purpose it can be said that the duty is intended to foster rational informed discussion thereby minimizing the potential for 'unnecessary industrial conflict.'"

The duty, therefore, serves a two-fold purpose. In the context of an emerging bargaining relationship the duty imposed by Section 14 of the Act reinforces the status of a trade union legally entitled to represent those on whose behalf it negotiates. The Board is satisfied that

recognition is not an issue in this matter. Rather it is the alternate purpose of the duty which must be considered by the Board in arriving at its determination in this matter; the duty of fostering rational, informed discussion. The jurisprudence of the Board as it relates to this alternate purpose establishes that the Board is concerned with the quality of bargaining as distinct from the result. The Board will not move to redress an economic imbalance (see re *Board of Health of Haliburton, The Kawartha, Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65 and *Ottawa Journal* decision Board Files Nos. 2081-76-U, 0041-77-U and 0048-77-U dated November 29, 1977). Each party is free to act in its own self interest in so far as it seeks to force contractual terms which are advantageous to it. The Board, however, will move to restore the decision-making framework which is essential to meaningful and informed collective bargaining if one party or the other bargain in such a manner as to undermine it. This may occur when one side refuses to engage in a full and open discussion (see *Canadian Industries Limited*, [1976] OLRB Rep. May 76), when one side tables fresh demands at the concluding stages of bargaining without good reason, (see *Graphic Centre (Ont.) Inc.*, [1976] OLRB Rep. May 221) or when one side deliberately misleads the other (see *Inglis Ltd.*, [1977] OLRB Rep. March 128).

12. The memorandum which was entered into on June 15, as with most memorandums concluded during the course of collective bargaining, was subject to ratification by both parties. Notwithstanding Mr. Ruffo's expectation that ratification would involve a pro forma approval, the Board is satisfied that the failure of the Board of Directors to ratify was a bona fide exercise of the discretion vested in it. The failure to ratify cannot be characterized as a ploy or tactical device to gain an unfair advantage. The evidence establishes that Mr. Ruffo, the Institute negotiator, exceeded his authority in agreeing to the date of signing for the cut-off of the long service annuity for new employees and that he went well beyond the 50/50 escalation cost sharing which had been suggested by the Board. P.I.S.A. was aware that ratification was required and in the absence of any evidence to suggest that the failure to ratify was other than a bona fide exercise of the discretion vested in the Board of Directors, P.I.S.A. cannot now be heard to complain that the failure to approve the memorandum is evidence of bad faith. Indeed the Board is hard pressed to imagine circumstances which would cause it to find that rejection of a memorandum made subject to ratification would, in and of itself, constitute bad faith bargaining.

13. A failure to ratify thrusts the parties, and in particular the negotiators, into a most difficult situation. They have reached an understanding which has not met the test of ratification and in so doing have made commitments and raised expectations. They must return to the bargaining table amidst the frustration and distrust which often accompanies a rejection and attempt to negotiate a settlement. The duty to bargain in good faith and make every reasonable effort to conclude a collective agreement continues after a rejection and the Board, when called upon to do so, must assess the quality of the bargaining which takes place during this period. The Board, however, must be careful not to confuse frustration with bad faith or to draw unfavourable inferences from a fixed or inflexible response to rejection which is sometimes adopted in these circumstances. The initial bargaining exchange following a failure to ratify is often an unreliable indicator of the quality of bargaining.

14. The Board in *Bruce Henderson Ltd.* [1977] OLRB Rep. July 424 dealt with a situation somewhat analogous to the instant situation. In that case the employer belonged to an unaccredited employers' association which was bargaining for a renewal of a collective agreement on behalf of its members. The employer withdrew from the association during

the concluding stages of bargaining. The union filed a complaint alleging that the withdrawal of the employer from the association constituted a violation of Section 14 of the Act. The Board found that the company was entitled by law to withdraw from the association when it did and its withdrawal, therefore, could not be construed as a breach of Section 14. The employer, however, notified the union of its intention "to commence bargaining" which caused the Board to comment that his use of the phrase "to commence",

"may reveal an intention on the part of Henderson to ignore completely the bargaining between the complainant and the Council, a course of conduct which would indeed leave Henderson's bona fides open to question."

In an attempt to assist the parties the Board went on to state that the direct negotiations between the individual employer and the union,

"must take place against the backdrop of the bargaining which has already taken place between the complainant and the council, which, until its bargaining authority was revoked was authorized to bargain on Henderson's behalf."

So too a failure to ratify does not signal a fresh start to the negotiations. The good faith effort of the parties which has resulted in a signed memorandum of settlement must form "the backdrop" to the bargaining which follows a failure to ratify. Each case is different, however, and each to a greater or lesser degree will require an alteration of the terms set out in the memorandum in order to bring about a collective agreement. This is not to say that a party violates Section 14 if it remains fixed in its attachment to the terms of settlement which are contained in the memorandum, nor is it to say that a party necessarily violates Section 14 if it backs away from those terms which have caused it to reject the memorandum.

15. In the instant case the bargaining dispute between the parties is limited to the four pension related issues; the mandatory retirement age, the discontinuance of the long service annuity for new hires, the provision for benefit escalation to 8% per annum and the cost sharing arrangement. All other matters are agreed and not in dispute. The evidence establishes that Mr. Ruffo exceeded his authority in respect of the cut-off date for the long service annuity and agreed to a cost sharing arrangement for escalation which was not acceptable to his principals. Mr. Ruffo who resigned as Chairman of the Institute bargaining team was replaced by Mr. Burla who made a "final" offer to P.I.S.A. on August 23 in accord with the motion passed at the July 16 Board of Directors meeting. The offer did not provide for increased escalation nor did it provide for a mandatory retirement age as requested by the employer. The "final" position tabled by Mr. Burla dealt only with the discontinuance of the long service annuity as of August 3, 1976. Negotiations broke off at this point without further discussion or explanation. Did the bargaining posture adopted by Mr. Burla on August 23 constitute a breach of the duty set out in Section 14 of the Act?

16. The Board does not characterize the bargaining stance adopted by Mr. Burla as a repudiation of the good-faith efforts leading to the signed memorandums of November, 1976 and June, 1977. Mr. Burla, on entering the negotiations for the first time, was in a most difficult position and clearly the employer's rejection of the settlement package had created

an element of friction between the parties. His offer dealt only with the pension-related issues and did not repudiate any of the other matters previously agreed. P.I.S.A., however, feeling itself betrayed, was, and remains, determined to secure the pension improvements contained in the signed memorandum. The Institute, on the other hand, is as determined to negotiate something less. The parties find themselves in a classic confrontation.

17. Mr. Burla tabled a "final" offer on the pension related issues on August 23rd as he had been instructed to do by the Board of Directors. The decision of the Board of Directors in this regard, while unpalatable to the union, is not evidence of bad faith following as it did upon a bona fide failure to ratify these very issues. It was, of course, open to the union to test the real, as distinct from the expressed, finality of the employer's position by applying for conciliation services. It chose instead to come to the Board under Section 14 of the Act.

18. The union was fully aware of the reasons for the employer's rejection of the June 16 memorandum. Mr. Mosley had made Mr. Coupland aware of the misunderstanding with respect to the cut-off date for long service annuity and clearly the union was aware of the disagreement between itself and the principles of the Institute with respect to cost sharing. In the circumstances the Board is not prepared to find that Mr. Burla's failure to fully discuss his proposal of August 23, the basis of which was understood between the parties, was a violation of Section 14 of the Act.

19. It is not for the Board to suggest possible compromises or to otherwise attempt to affect the outcome of bargaining. Mr. Burla has adopted a hard line on the few remaining issues which remain in dispute and in so doing his bargaining stance, although it may result in an economic confrontation, cannot be construed as a violation of Section 14 of the Act.

20. Having regard to all of the foregoing, this matter is hereby dismissed.

1424-77-U Robin Albert Amor, (Complainant), v. Union of Canadian Retail Employees, C.L.C., (Respondent).

Duty of Fair Representation – S. 79 – Whether alleged waiver by union of grievor's seniority rights breaches duty

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members C.G. Bourne and O. Hodges.

APPEARANCES: *Robin Albert Amor on his own behalf; Paul Cavalluzzo and Dan Gilbert for the respondent.*

DECISION OF THE BOARD: January 30, 1978.

1. The name "Union of Canadian Retail Employer's C.L.C." appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Union of Canadian Retail Employees, C.L.C.".

2. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 60 of the Act.

3. Section 60 provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members or the trade union or of any constituent union of the council of trade unions, as the case may be.

4. The complainant testified that he had been working for Loblaws Limited for about two years as a mechanic in the garage when he was laid off and was offered a job as a driver. He accepted the driver's job. He told the Board that some four months earlier, there had been a layoff in another department and several of the laid-off employees had transferred to the Transport Department with full seniority. The complainant, however, was advised that his transfer to the driving job did not permit him to exercise his seniority with respect to job position and job posting in the Driving Department. He retained total company seniority for all other purposes. This represented a change in the seniority arrangements from those that had prevailed at the time of the transfers that occurred four months earlier.

5. It is common ground that the change in the seniority arrangements arose, in fact, out of the transfers referred to by the complainant. The regular drivers whose seniority had been acquired in that classification were disturbed by the fact that some of them had been required to train some of the transferees as drivers. These latter, when trained as drivers, could then use their seniority, acquired elsewhere, to displace the drivers who had trained them.

6. Arising out of the discontent of the drivers with the above application of seniority, a discussion of the issue of seniority took place on Sunday, November 21, 1976.

7. As a result of the discussion at the union meeting and of consultations and agreement with the management of Loblaws, the union issued the following notice:

"TO: TRANSPORT DIVISION MEMBERS

Greetings:

At the General Membership Meeting held on November 21st, 1976, a majority of the members in attendance approved the following, as it pertains to the application of seniority:

- (a) Anyone from the Garage and B & E who is inexperienced in driving who bumps into a driving job, exercises total Company seniority for all purposes except job position and job posting.
- (b) Anyone from the Transport who goes into Garage and B & E and

back to Transport, exercises total Company seniority for all purposes.

- (c) In the event there is to be a lay-off resulting in the reduction in numbers in the Transport Division, lay-offs will be in accordance with total Company seniority."

8. The complainant feels that this action by the union was discriminatory. In the first place, he argued, the driving staff vastly outnumbers the garage personnel and can therefore dictate union matters as they had, in fact, done with respect to seniority at the November 21st meeting. He feels that since the garage and transport departments are within the same Local and seniority had prevailed throughout before, it was very unfair that rules could be changed by the majority to the benefit of one segment of the Local. The complainant feels the unfairness of this arrangement is made even less acceptable by the fact that drivers can carry their full seniority with them at all material times. This is an advantage which, according to the evidence, is more apparent than real.

9. Mr. Amor's complaint involved not only the new application of seniority in general so that it might conform to the wishes and benefit of the majority in the Local who were truck drivers, but also as it had been applied to him personally.

10. He contended that he was not "inexperienced in driving", so that the paragraph lettered (a) in the notice was not applicable to him. He further stated that he was a qualified truck driver for years before coming to Loblaw's and that, as a mechanic, he had been required to drive trucks for Loblaw's from time to time.

11. Furthermore, the complainant argued that he fell within the beneficial terms of clause (b) in the notice because he had been transferred from a driving job to a garage classification and back to transport.

12. On the face of the document set out above, it is not difficult to understand how Amor could come to the conclusion that he was being denied the beneficial aspects of clauses (a) and (b). His interpretation however is, according to the evidence, not the one placed upon the wording by the company and the union.

13. The evidence is that the term "inexperienced" used in clause (a) of the notice is understood by the company and by the union to refer to anyone who had never been classified as a driver for Loblaw's. That would exclude outside experience. The evidence also was that the word "anyone" used in clause (b) meant anyone who had been classified as a driver.

14. The evidence also established that the matter of the application of seniority as set out in the notice of April 6th, 1977, had been raised at a general meeting held on December 4th, 1977. At this meeting, a motion was made that the members reconsider the matter of seniority. There was a discussion in which, according to the evidence, it was made quite clear what "experience" meant and what "transferring" meant in the notice. The motion to reconsider was defeated in a vote by the membership.

15. There can be little doubt that the agreement made with respect to the application

of seniority adversely affected Amor. It is equally clear, however, that the arrangement arose because of the fact that the interpretation formerly applied to the seniority provisions of the collective agreement was causing difficulty with persons whose seniority as truck drivers was being superseded by untrained personnel usurping the drivers' jobs after being trained by the drivers. The move was instigated as the result of protests and was accomplished by the vote of a majority of the union members, albeit that it was a vote at which drivers predominated. Following the majority decision, the matter was taken up with the company and an oral agreement was reached to interpret the seniority provisions in the manner suggested by the union. No change was made in the collective agreement.

16. Obviously, although the complaint was the first employee to be affected by the change, the change was not directed at him personally, but was one of general application in the area and one that equally affected others in the bargaining unit who might move into the transport department.

17. It is common knowledge that, in attempting to exercise its rights as bargaining agent for all employees in a bargaining unit, a trade union is often faced with problems arising out of the diverse and conflicting interests of persons and classifications which comprise its membership. It is obliged, therefore, to attempt to maintain a compromise or balance between those interests – a process which must inevitably require a certain amount of give-and-take by the parties for the sake of the whole of the bargaining unit. Where such give-and-take is not voluntary, the union must impose a settlement that is as equitable as is possible in the circumstances.

18. It appears to us that in the present case the union has acted in a manner that is neither arbitrary, discriminatory, nor in bad faith in the action it took in an attempt to resolve the problem of the application of the seniority provisions of the collective agreement. Indeed, it did nothing more than carry out the instructions of the majority of its members in obtaining from the company agreement on the interpretation to be given the seniority provisions. It is true that the majority decision adversely affected the complaint and others in the minority group, but that is a result inherent in the voting procedure, and not a violation of section 60 of *The Labour Relations Act*.

19. The complaint is accordingly dismissed.

2094-76-R; 2095-76-R; 2096-76-R; 2097-76-R; 2135-76-R; 2136-76-R; 2143-76-R; 2144-76-R; 2147-76-R; 0178-77-R; 0179-77-R; 0186-77-R. Labourers' International Union of North America, Local 837, (Applicant), v. **Robertson-Yates Corporation Limited**, Frid Construction Co. Ltd. et al (Respondents), v. Operative Plasterers' and Cement Masons' International Association Local 298, (Intervener # 1), v. United Brotherhood of Carpenters and Joiners of America, Local 18, (Intervener # 2), v. Ontario Provincial Conference I.U.B.A.C., (Intervener # 3).

Certification – Membership Evidence – Representation Vote – Whether organizing campaign prior to a raid involved misrepresentation – Effect on membership evidence and subsequent representation vote.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members J.D. Bell and E. Boyer.

APPEARANCES: *A.M. Minsky, M. McPhedran and H. Mancinelli appearing for the applicant; L.C. Arnold and Anthony Mariano appearing for intervener #1; no one appeared on behalf of any of the other parties with respect to those matters dealt with in this decision.*

DECISION OF THE BOARD: January 20, 1978.

1. These are a series of applications for certification filed by Labourers' International Union of North America, Local 837 ("Labourers' Local 837"), a union which has offices in Hamilton and St. Catharines. With respect to most of these applications Labourers Local 837 is seeking to obtain bargaining rights currently held by Operative Plasterers and Cement Masons' International Association, Local 298 ("Local 298") which is based in the City of Hamilton. In connection with these displacement applications Labourers' Local 837 requested the taking of pre-hearing representation votes, and as a result of this request a series of votes was held in which employees were asked to indicate whether they wished to be represented by Labourers Local 837 or by Local 298 of the Operative Plasterers. The ballots cast in these pre-hearing representation votes have not as yet been counted.

2. Apart from the applications where pre-hearing representation votes were requested the applicant also filed two "regular" applications for certification involving certain employees of the Canada Gunit Co. Ltd. ("Canada Gunit") and Arthur G. McKee Company of Canada Limited ("McKee"). Both of these companies employ members of Local 298 although Local 298 does not possess any formal bargaining rights with respect to its members so employed.

3. A number of issues have arisen with respect to these applications. This decision, however, deals only with contention of Local 298 that the Board should not accept any of the evidence of membership filed by Labourers Local 837 but should instead dismiss the applications. As an alternative position counsel for Local 298 contended that the Board should direct the taking of new votes where votes have been held and also that the Board should not certify Labourers Local 837 with respect to any employees of Canada Gunit and McKee without first directing the taking of representation votes. Those parts of the hearing before the Board which centered around these contentions had as participants only

the representatives of, and witnesses called by, Local 298 and Labourers Local 837. Representatives of a number of the other parties participated in the hearings with respect to certain other issues but withdrew once this aspect of the case came on for hearing. It is perhaps worth noting at this point that not only did none of the respondent employers participate in this aspect of the proceedings before the Board, but there is nothing in the evidence to indicate that any of the employers took any steps which might be viewed as supporting one of the rival unions over the other.

4. Having regard to the nature of the arguments put forward by counsel for Local 298 we propose to set forth the evidence in quite some detail without limiting it only to those matters relied upon by counsel in support of his position.

5. The Operative Plasterers' and Cement Masons' International Association, is an international building trades union which has a number of locals in various centres throughout Ontario. As its name indicates, its membership is comprised primarily of plasterers and cement masons. Some of its locals are comprised only of plasterers and others only of cement masons. Local 298, however, has as members tradesmen of both classifications.

6. Over the past 10 years the Operative Plasterers' and Cement Masons' International Association in this province has faced a number of serious difficulties. Foremost of these has been a drastic decrease in the demand for plastering skills due to the increased use of drywall for interior walls. Mr. Mariano, the International Representative of the union for Eastern Canada, indicated that although in the not too distant past two-thirds of the union's membership had been comprised of plasterers and one-third of cement masons, today because of the decline in the use of plasterers these figures have been reversed. Quite apart from this problem, however, the union in Ontario has also suffered from having a number of its officers and members switch to other unions. The combined effect of the decrease in demand for plasterers and the shifting of allegiance to other unions has been to cut the union's membership in Ontario by one half over the past ten years.

7. At the beginning of 1977 Local 298 had approximately 160 members. It had clearly suffered as a result of the decrease in demand for plasterers, although not to the same extent as some of the other locals. The person most responsible for the conduct of the affairs of the local over the past 18 years was Mr. Duncan McGregor, who until March of 1977 had served as both its financial secretary and business manager. Mr. McGregor served under two different local presidents, namely, Mr. R. Bellamy and Mr. C. Wilson, and both of these men spoke very highly of the work that he had done on behalf of the local. Indeed all of the members (or former members) of Local 298 who testified, no matter which side called them as a witness, spoke favorably of Mr. McGregor's activities on behalf of the local over the years. Only one member of Local 298 who testified, namely Mr. A. LePage, had any negative comments concerning Mr. McGregor's performance in this regard, and these comments were essentially limited to saying that he had not always agreed with what Mr. McGregor was doing, although at other times he felt that Mr. McGregor had performed his job well.

8. Several of the witnesses stated that they felt that the membership of Local 298 had trusted Mr. McGregor. Counsel for both sides, in fact, agreed that as a whole the membership of Local 298 had trusted him.

9. The officers of Local 298 had not for some time been favorably disposed towards the parent International Union. Both former Presidents Bellamy and Wilson complained, rightly or wrongly, about a lack of support from the International during the period when the availability of work began to decline. Mr. Wilson claimed that the local had been left to fight its own battles and get along as best it could. Mr. Bellamy was particularly bitter about the International's failure to assist the local in a jurisdictional dispute with a local of another union involving certain work on the McMaster Medical Centre. According to Mr. Bellamy Local 298 lost some 20 to 30 members when they joined the other union so that they could work on the project. It is interesting to note that Mr. LePage, the witness who expressed certain reservations about Mr. McGregor's job performance, was even harder on the International. During his cross-examination Mr. LePage indicated that he had not been happy with the International because it was "not strong enough, not militant enough and it didn't give a damn about us".

10. Quite apart from Local 298's problems with the International it also had problems with one of its sister locals next door. Local 598 of the Operative Plasterers' and Cement Masons' International Association ("Local 598") is a large Toronto based local comprised only of cement masons. Mr. Mariano placed its membership at somewhere between 500 and 600 members, which would appear to make it by far the largest local of the union in the Province. Local 298's problems with Local 598 had their origin in the practice of a number of Toronto based contractors of bringing members of Local 598 with them to work on projects in the Hamilton area. This resulted in a feeling among a number of Local 298's members that Local 598 men were taking away work which rightfully belonged to them. Also, there existed an arrangement or agreement whereby Local 298 was to receive certain "working dues" from Local 598 with respect to the time Local 598 men spent working in Hamilton. Whatever the truth of the matter, the officers of Local 298 felt that the local was not receiving all of the money it should have under the arrangement.

11. In May of 1976 there was released the report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry ("the Frank's Report"). The report recommended that province-wide multi-employer single trade bargaining be introduced in the industrial, commercial and institutional sector of the construction industry, a recommendation which was later to be accepted by the Provincial Legislature. (See *The Labour Relations Amendment Act, 1977* which was given Royal Assent on October 27, 1977). The Frank's report also recommended that any building trade union which had more than one local in the Province, but which lacked any mechanism for Province-wide bargaining, proceed to establish a council of its locals within the Province. (This recommendation is discussed in length at pages 63-66 of the report.)

12. On July 27, 1976, Mr. Mariano, the International Representative of the Operative Plasterers' and Cement Masons' International Association for Eastern Canada, met in Washington with certain of the members of the international executive of the union. Among the topics discussed at the meeting was the prospect of province-wide bargaining and also the structure of the union locals in the province. Mr. Mariano stated that a desire was expressed at the meeting that certain of the union locals merge although, he continued, he was assured by the union's General Secretary that any mergers would have to be voluntary. During his cross-examination Mr. Mariano went on to indicate that Mr. Joseph T. Power, the General President of the International, expressed a preference for a single province-wide local in Ontario.

13. On August 5, 1976, a special all-day meeting of the Ontario Locals of the Operative Plasterers' Association was held in Toronto. Attending on behalf of Local 298 were Mr. Wilson, its President, and Mr. McGregor, its business manager. The meeting had been called by Mr. Power, the International Union's General President, and Mr. Power presided over the morning session. Mr. Power was not present at the afternoon session. In the morning discussion centered around the recommendations contained in the Frank's report and with Mr. Power's request that a Provincial Conference be established for the purpose of conducting province wide bargaining. Mr. Power also suggested that the delegates give serious consideration to the formation of one local for all of the province, and in this regard Mr. Power either circulated or referred to a document (which was subsequently included in the minutes of the meeting) which set forth certain proposals concerning the means of establishing and operating such a province-wide local. While the proposals did not deal directly with the question of whether all existing locals would be required to join in with such a local they did suggest that "the merger would not be effective until all local unions voluntarily approved the proposed by-laws. This way no local union would feel it was getting pushed into an unknown".

14. At the afternoon session on August 5th a general consensus seems to have been arrived at concerning the wisdom of establishing a Provincial Conference of Ontario locals. In furtherance of this agreement a committee, varyingly referred to as a "steering committee" or "ways and means committee" was established to look into the details associated with the formation of a Provincial Conference. Mr. McGregor was selected to serve as one of the members of the committee. The steering committee was also instructed to look into the question of the amalgamation of locals and the possibility of one local being formed for all of Ontario.

15. The next event of any significance occurred on November 25, 1976 at a meeting of the membership of Local 298. Mr. Mariano attended the meeting and addressed the some 40 to 45 members present. In his speech Mr. Mariano suggested that the Province be divided into 5 separate areas, with one local for each area. One of the 5 areas he proposed would take in Toronto, Hamilton, Kitchener, Brantford and the Niagara Peninsula. There does not, in fact, exist any functioning locals of the Operative Plasterers' Union in either Kitchener, Brantford or the Niagara Peninsula. This being the case, the proposal would in effect mean a merger of Local 298 and the various Toronto based locals, of which Local 598 has by far the greatest number of members. The reaction of the membership of Local 298 to this proposal was extremely negative.

16. A second meeting with respect to the proposed formation of a Provincial Conference was held on November 28, 1976. Local 298 was represented at the meeting by Mr. McGregor and a member by the name of John Teixeira. At the meeting the delegates considered a draft constitution for the Conference which had earlier been prepared by the steering committee, and also put their minds to the question of possible mergers. At some point prior to the meeting a member of the steering committee – it is not clear who – had prepared a paper recommending the consolidation of the various locals into 5, much along the lines already proposed by Mr. Mariano. Mr. Jean-Guy Denis, the business manager of Local 124 in Ottawa and a member of the steering committee, testified that the proposal was never put forward by the committee at the November meeting. However, the minutes of that meeting which were kept by Mr. Denis do refer to the proposal as having been at least discussed at the meeting, although to what extent is not at all clear. What is clear is that the proposal was

not put forward as the recommendation of the committee as a whole. Rather, the committee proposed that those locals which wished to merge do so, and that additional areas be added to the territorial jurisdiction of the various locals. The area proposed to be added to Local 298's jurisdiction included the cities of Kitchener, Waterloo, Cambridge and Guelph.

17. Mr. McGregor in his testimony clearly indicated that he was not impressed by the proposal that 298's territorial jurisdiction be extended. Indeed he referred to the proposal as being "misleading". According to Mr. McGregor most of the plastering work in the relevant area is done by members of the International Union of Bricklayers and Allied Craftsmen, and that when members of Local 298 do work in the area they have to pay an assessment to the Bricklayers' Union. There was some dispute at the hearing as to whether or not Mr. McGregor had bothered to even tell the membership of Local 298 about the proposal to increase its territorial jurisdiction. Having carefully reviewed our notes it appears that only two witnesses, namely Mr. McGregor and Mr. Wilson, directly touched upon this matter in their testimony. Mr. Wilson, the President of Local 298, stated that while Mr. McGregor had outlined the proposal to him in conversation, he could not specifically remember Mr. McGregor raising it at a meeting of the membership. Mr. McGregor, however, testified that he had informed the members of the proposal. There being no evidence to directly rebut Mr. McGregor's contention in this regard, we accept that on at least one occasion he did raise the matter with the membership of the local.

18. The next event of any significance occurred on an unspecified date either in late January or early February of 1977. On that day Mr. Enrico Mancinelli, the secretary-treasurer of Labourers Local 837, indicated to Mr. McGregor that his local was planning to "raid" Local 298. Mr. Mancinelli also intimated that he would ask the executive board of Labourers Local 837 to consider a position for Mr. McGregor with the local.

19. We are satisfied on the basis of Mr. Mancinelli's evidence that no formal offer of a job was ever made to Mr. McGregor, although if Local 837 is successful in these applications – and particularly those which relate to cement masons – the executive board of Labourers Local 837 will likely seriously consider making such an offer. Notwithstanding the fact that we accept that no formal job offer was ever made to Mr. McGregor, on the basis of Mr. McGregor's statements in this regard we are of the view that Mr. McGregor himself was of the impression that his conversation with Mr. Mancinelli in fact amounted to an offer of employment. It is perhaps worth noting at this point that the evidence establishes that Mr. McGregor was never placed on the payroll of Labourers 837 and never received any payments from that Local. As will be noted later, Mr. McGregor in March of 1977 did leave the employ of Local 298. Upon doing so he was without a job for a period of time, although he subsequently found employment as a plasterer and later went into business for himself.

20. Counsel for the parties in their final submissions took differing positions as to whether or not Mr. McGregor had informed the members of Local 298 that he had been approached by Labourers Local 837 about a possible job. Mr. McGregor was emphatic in his testimony that he told those members present at a meeting of Local 298 held on February 17, 1977 that he had been offered a job by Labourers Local 837. No evidence was called to dispute or contradict this statement. We therefore accept Mr. McGregor's evidence in this regard. We would also note, however, that it is clear that the issue of a possible job with Local 837 was never again raised. Still on the issue of jobs, Mr. McGregor stated in evi-

dence that in the past he had also received job offers from representatives of both the International Brotherhood of Carpenters and Joiners and the International Union of Bricklayers and Allied Craftsmen.

21. At the meeting of the membership of Local 298 on February 17th another event of some significance occurred. A motion was made from the floor that a committee be set up to investigate the possibility of the members of Local 298 joining another trade union. The persons chosen to staff the committee were two plasterers, Mr. A. Grigg and Mr. John Welsh, two cement masons Angelo Lavolente and John Teixeira, as well as Mr. Wilson, the local's president, and Mr. McGregor. Mr. Teixeira appears to have acted as the chairman of the committee. The committee was instructed to investigate three different unions, namely, the Labourers, the Carpenters and the Teamsters.

22. Three of the committee members testified as to why the committee had been formed. Mr. Teixeira, who was called to testify by counsel for Local 298, stated that it was the belief of the members that they could get a better deal out of another union. Mr. Wilson, called by counsel for Labourers Local 837, stated that the committee was formed because the local's membership was going down the drain because they could not stop the Toronto people from coming in. Mr. Grigg, also a witness for Labourers Local 837, indicated he felt the committee had been formed because the local had been getting weaker all the time.

23. The next major happening was a meeting of delegates from the various Ontario locals of the Operative Plasterers on February 25th and 26th in connection with the proposed Provincial Conference. The meeting was chaired by Mr. McGregor, who had on the first of February been selected by the steering committee to act as interim president of the Conference, a move affirmed by the delegates at the meeting on February 26th. Apart from Mr. McGregor, the roll call of the meeting indicates that Local 298 was also represented by one Ennio Milan on the 25th and by members John Teixeira and Ross Jack on the 26th.

24. At the meeting on the 25th Mr. Mariano made a report on behalf of the steering committee. He indicated that while two of the smaller Toronto locals were willing to consider merging, Local 298 had ruled out any merger with Local 837. At this time maps were distributed showing the proposed increases to the territorial jurisdictions of the various locals. On the second day of the meeting Mr. Mariano made a further report with respect to possible mergers. On this date as well a set of by-laws for the Provincial Conference was approved and a formal application for a charter for the Conference was signed by the delegates. The first three to sign were Mr. McGregor, Mr. Teixeira and Mr. Jack in that order. A charter was in fact issued on March 17, 1977.

25. Shortly after the meeting with respect to the proposed Provincial Conference, representatives of the committee set up by Local 298 to meet with the other unions commenced their task. For some reason never explained to the Board, no meeting was ever held with representatives from the Teamsters. On a day either at the end of February or beginning of March 1977 the committee met with Mr. Mancinelli and other officers of Labourers Local 837. On March 5th a similar meeting was held with certain representatives from one of the carpenters' locals. Subsequent to these meetings the members of the committee reached agreement that of the two unions approached, Labourers Local 837 had made the better offer.

26. This then brings us to the meeting of the membership of Local 298 held on March 10, 1977. The meeting, which was called by Mr. McGregor, was attended by about 60 of the members. Mr. Wilson, the Local's President, opened the meeting, but then turned the conduct of the meeting over to Mr. McGregor. Each of the witnesses who testified seemed to have his own version as to just what Mr. McGregor said at the meeting. However, at a minimum it appears that he noted that there was a possibility of one province-wide local being formed. The evidence also establishes that at this meeting and/or earlier in conversations with various members of the Local, Mr. McGregor also expressed a concern that the province would be divided into five areas with only one local in each. As noted above, at no time did Mr. McGregor seek to assure the members of Local 298 that any mergers would be on a voluntary basis only.

27. During his cross-examination a number of questions were put to Mr. McGregor concerning his understanding of the terms of any possible future mergers. His answers essentially were that although the locals might not want to be forced into mergers, there was no guarantee they would not be. He referred to the fact that the union's General President favoured mergers and that he had never heard the President say that any mergers would be on a voluntary basis only. Mr. McGregor also described the General President as having an "iron fist" with the authority to merge locals together if he so desired. Section 12(v) of the constitution of the International Union in fact provides that the General President, with the sanction of the General Executive Board, can order and enforce the consolidation of two or more union locals.

28. At the March 10th meeting Mr. Wilson asked Mr. Teixeira to report the recommendation of the committee which had met with the other unions. Mr. Teixeira, however, declined to do so. After some delay someone – varyingly identified as Mr. Teixeira, Mr. Wilson and Mr. McGregor, indicated that Labourers Local 837 had been the choice of the committee.

29. At that point Mr. Mancinelli, who had been waiting outside the meeting hall, was invited in and given an opportunity to address the membership. Mr. McGregor stated that Mr. Mancinelli must have been invited to the meeting by some of the members and further indicated that his presence had been a surprise to him. The more logical explanation for Mr. Mancinelli's presence, however, and the one which we accept, was that put forward by Mr. Mancinelli himself. Mr. Mancinelli stated that two specifically named individuals who held dual membership in Local 298 and Labourers Local 837 went to his office and urged him to attend the meeting. Having received this invitation, however, Mr. Mancinelli made a point of telling Mr. McGregor of what had happened. At that point Mr. McGregor confirmed to him that a meeting had been called for March 10th. Mr. Mancinelli in his testimony stated that although he could not now remember having done so, he probably would have made a point of clearing his attendance at the meeting with Mr. McGregor.

30. Mr. Mancinelli spoke to the meeting for some 20 to 45 minutes, and then left the hall. He referred in his speech to some of the benefits which he felt his union could offer the men, and in particular he described welfare, benefit and pension plans for which they might become eligible. In discussing the pension plan he indicated that some of the men would be entitled to past service credits in the plan. At the end of his speech Mr. Mancinelli indicated that he would be available at the Labourers' hall in the event that anyone wanted to come over later and sign an application for membership into Labourers' Local 837.

31. Following Mr. Mancinelli's presentation a motion was made from the floor that a representative of Local 18 of the United Brotherhood of Carpenters and Joiners be invited to a meeting to also make a presentation. This motion, however, was defeated by a vote of 39 to 3. At that point in the meeting a vote was taken as to whether or not the men present wanted to go with Labourers Local 837 or remain with Local 298. Ballotting involved marking a "Yes" on a blank ballot if one wanted to go with Labourers Local 837 and a "No" if one wanted to stay with Local 298. According to Mr. McGregor this procedure had been proposed from the floor of the meeting. The result of the balloting was "Yes" (837) 45 and "No" (298) 13.

32. Following the meeting some twenty five men went over to the Labourers' hall, paid a dollar and signed applications for membership into Labourers' Local 837. Mr. Teixeira was one of the ones to do so. A number of other members of Local 298 went to the Labourers' hall over the next four days to also sign applications for membership. The great majority of the applications for membership are dated between March 10 and March 15. A number of certificates of membership were also filed. Apart from the Canada Gunitite case, these certificates would appear to relate primarily to men who worked on cement either as a labourer or a cement mason as the opportunity presented itself.

33. On March 11, 1977 Mr. McGregor wrote out a resignation as business manager of Local 298 and handed it to Mr. Wilson, the local's president. Mr. Wilson, in turn, wrote out his resignation and handed it to Mr. McGregor. Both resignations were then placed in a filing cabinet in the local's office. According to Mr. McGregor the only person informed of the resignations was Mr. Bellamy, the secretary and the one-time president of Local 298. If Mr. Bellamy was so informed, however, he seems not to have taken any action with respect to the resignations. Indeed on March 14th Mr. Bellamy went to the Labourers' hall to apply for membership into Labourers' Local 837.

34. On March 12, 1977 Mr. McGregor went on vacation to Florida, returning on March 19th. On his return he spent a great deal of time in the Labourers' Hall, to whose number someone had asked the telephone operator to refer all of the calls for Local 298. This referring of telephone calls was subsequently brought to an end by Mr. Mariano. From his position in the Labourers Hall Mr. McGregor issued a number of referral slips in the name of Local 298 to men seeking employment at the McKee job site in Nanticoke. Mr. McGregor stated that he made the referrals at the request of the men involved because he did not want to turn his back on them. In all about a dozen referrals were involved.

35. Although Mr. McGregor had left his resignation in the files at the offices of Local 298, it did not take very long before Mr. Mariano became aware of what had occurred. The first of these applications was filed on March 16, 1977, and Mr. Mariano indicated that he had received notice of them from the Board. Further, on Mr. McGregor's return from Florida he was asked to meet with representatives of the International Union. The meeting took place in Toronto on March 22nd, with Mr. Mariano and Mr. M.H. Roots, the Executive Vice-President of the International, in attendance. At this meeting Mr. McGregor indicated that he was through with the union. He also refused to sign any of the intervention forms on behalf of Local 298. On March 28th both Mr. McGregor and Mr. Mariano attended at a pre-hearing vote meeting with an officer of the Board. At that time Mr. McGregor informed Mr. Mariano that he was attending on behalf of Labourers 837.

36. Having become apprised of the situation Mr. Mariano commenced a campaign to regain support for Local 298. He called and then conducted a meeting of the membership of the local on April 6, 1977. At this meeting he expained why in his view the men had erred in supporting the Labourers. He also told them that they had been misinformed by Mr. McGregor and that not only was there not going to be any forced merger of the Local but that to the contrary the territorial jurisdiction of Local 298 was going to be expanded. At the request of some of the men in attendance a second meeting was held on April 11th with both Mr. Mariano and Mr. McGregor in attendance. At this meeting Mr. McGregor, in response to a question from Mr. Mariano, stated that he had resigned from Local 298. Shortly after this, Mr. McGregor left the meeting.

37. Mr. Mariano's attempts to regain support for Local 298 met with some degree of success as a number of men who had applied for membership in Labourers Local 837 swung their support back to Local 298. One of these men was John Teixeira, the chairman of the committee which had met with the other unions. Indeed Mr. Teixeira agreed to take on the job as acting business agent of Local 298.

38. As already noted a series of pre-hearing representation votes were conducted by the Board with respect to most of these applications. The votes were held between April 16, 1977 and June 4, 1977. Voters were asked to indicate whether they wished to be represented by Labourers Local 837 or by Local 298 in their employment relationships with their employer. Both sides were free to engage in election propaganda up to the 72 hour "silent period" prior to the date of each of the votes.

39. Having set out the facts relevant to these proceedings, we turn now to consider the position taken by counsel for Local 298. The essence of Local 298's case is that Mr. McGregor held a position of trust and that he betrayed that trust when he failed to reveal all of the relevant facts to the members of Local 298 concerning his discussions about a job with Labourers Local 837, the proposed enlargement of Local 298's territorial jurisdiction and the fact that any mergers of the locals would be voluntary. With respect to this latter point, counsel contended that Mr. McGregor had played on the fear of the members of Local 298 of any forced merger with Local 598 by indicating that such a merger was inevitable. Apart from what Mr. McGregor allegedly said, or did not say, counsel for Local 298 also contended that the nature of the vote taken on March 10th was such that the local's members might well have regarded it as having some official sanction. He also contended that Mr. Mancinelli had misled the men with respect to the Labourers' pension plan. With respect to this point counsel submitted firstly that Mr. Mancinelli's portrayal of the availability of past service credits had been inaccurate, and secondly that the employees should have been told that if there were to be any great increase in past service liability the pension plan would become actuarially unsound. It was on the basis of all of these grounds that counsel submitted that the Board should either reject all of the evidence of membership filed by Labourer's Local 837 or, in the alternaive, direct the taking of a new representation vote with respect to each of the applications.

40. As a first comment in considering the principles to be applied in this case, we would note that the issue before the Board concerns solely the acceptability of the evidence of membership filed by Labourers' Local 837 and, if it is acceptable, whether the Board should nevertheless direct the taking of new representation votes. The question before us is not whether Mr. McGregor and the other officers of Local 298 did or did not discharge

faithfully their duties as officers, or whether they did or did not breach the Constitution of the International Union or the by-laws of the Local.

As the Board noted in the *International Nickel Company* case (1962) CLLC ¶16,284, these are matters which lie within the jurisdiction of the Courts and the internal procedures of the union itself, and are not the direct concern of this Board when dealing with applications for certification.

41. As indicated, counsel for Local 298 has requested that the Board reject all of the evidence of membership filed by Labourers 837 in these proceedings. The evidence of membership takes the form of both combination applications for membership and receipts, all of which are signed by an employee and indicate that one dollar payment has been made, as well as a number of certificates of membership which indicate a recent payment of monthly dues in excess of one dollar. With respect to each file there has also been filed a duly completed Form 54 – Declaration Concerning Membership Documents, Construction Industry. In short the requirements of both section 1(1)(j) of the Act and the Board's Rules of Procedure with respect to evidence of membership have been met. Further, there is nothing before the Board to indicate that the monetary payments referred to above were not in fact made by the employees or that any of the employee signatures were forged. In short, all of the board's "technical" requirements with respect to evidence of membership appear to have been met.

42. Even where a union's membership evidence is otherwise in order, however, the Board will not accept the membership in order, however, the Board will not accept the membership evidence if it has been obtained contrary to section 61 of the Act, that is by coercion and intimidation. The Board has held that this type of improper conduct can take the form not only of threats of physical violence but also of threats of loss of employment. (These matters are discussed at length in *The Kendall Company [Canada] Limited* case [1975] OLRB Rep. Aug. 611.)

43. With respect to the instant proceedings, there is no evidence at all to indicate that employees were physically coerced or intimidated into signing applications for membership into Labourers Local 837. We are more than a little troubled by the action of Mr. McGregor in issuing Local 298 referral slips with respect to the McKee job at Nanticoke from his position in the Labourers hall after he had left Local 298's employ. Quite apart from the obvious impropriety of this action, employees at McKee might well have concluded that Labourers Local 837 was now involved in placing employees at McKee and that perhaps continued employment with McKee was somehow connected with support for Labourers Local 837. Had any of the evidence of membership with respect to McKee been signed after these referrals, then the Board would have had to consider its effect on the acceptability of the membership evidence. As it is, however, this question need not be decided. All of the evidence of membership filed in these proceedings with respect to McKee is dated well prior to the issuance of the referral slips. The issuing of the referral slips, therefore, cannot be said to have influenced any of the employees into signing for Labourers Local 837. It is perhaps worth noting that only four of the applications for membership filed in all of these proceedings are dated after the issuance of the McKee referral slips.

44. Having regard to the fact that all of the evidence of membership filed in these proceedings appears to be in order, and having regard to the fact that there is no evidence to

indicate that it was obtained by coercion or intimidation, we are of the view that counsel's submission that the Board should refuse to accept the evidence of membership and thus dismiss all of the applications for certifications cannot succeed.

45. Quite separate and apart from the issue of the acceptability of evidence of membership filed with the Board, however, is the question of the circumstances under which the Board will direct the taking of a representation vote. Even in instances where a union has met the statutory requirements for automatic certification through the filing of evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit, the Board has the discretion, pursuant to section 7(2) of the Act, to nevertheless direct the taking of a vote. Generally the Board will exercise its discretion in this regard in instances where the certification of an applicant union would result in the termination of the bargaining rights of an incumbent union. (See: *Nadeco Ltd.* [1970] OLRB Rep. April 141.) The Board will also direct the taking of a representation vote in instances where although the Board is satisfied that coercion or intimidation has not been employed to obtain the evidence of membership, nevertheless the circumstances surrounding the obtaining of the evidence of membership are such as to raise a reasonable doubt as to whether the evidence of membership in fact represents the true wishes of the employees. (See: *Alex Henry & Sons Ltd.* [1977] OLRB Rep. May 288.)

46. In the instant case the applicant, doubtless aware of the Board's general practice of ordering representation votes in displacement situations, requested the taking of pre-hearing representation votes with respect to each of the employers for whose employees Local 298 held bargaining rights. As already noted, however, no such votes were held with respect to Canada Gunite or McKee. We propose to deal with these two companies separately.

47. Almost all of the evidence of membership filed with respect to McKee consists of applications for membership executed on or shortly after March 10, 1977, i.e. within a relatively short space of time following the meeting of March 10th. At the March 10th meeting a vote was held as to whether the members of Local 298 wished to stay with the local or instead go with Labourers 837. The vote itself could not, of course, have any legal effect and would not be binding on either Local 298, any of the members of Local 298 or this Board. We are concerned, however, that members of Local 298 might at the time have regarded the vote as being in some way binding on themselves. This concern is reinforced by the fact that two witnesses, Mr. A. LePage and R. Infanti (a cement mason working for McKee) both indicated that they felt that with the March 10th vote the members of Local 298 had already gone in with Labourers Local 837. Indeed Mr. LePage stated that he felt that the vote had brought the men into the Labourers union and that the signing of the applications for membership merely constituted the related paper work.

48. Having regard to our concern that the employees of McKee might have signed the applications for membership under the impression that they were somehow bound by the results of the informal vote of March 10, 1977, we are satisfied that even if Labourers Local 837 proves to be in a position to otherwise be certified outright with respect to employees of McKee, nevertheless the Board should exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote.

49. We have concerns similar to those expressed above with respect to certain of the

evidence of membership filed with respect to Canada Gunité. A complicating factor here, however, is that most of the evidence of membership filed consists of certificates of membership which indicate that the employees involved were members of Labourers Local 837 prior to March 10th. The presence of so many certificates of membership would seem to be related to the fact that with respect to this application Labourers Local 837 has requested that the bargaining unit be described in such a way as to include not only plasterers and cement masons but also construction labourers. In these circumstances we are satisfied that the Board should not certify Labourers Local 837 with respect to employees of Canada Gunité without directing the taking of a representation vote unless the local would be eligible to be so certified without having to rely on any of the applications for membership executed on or after March 10, 1977.

50. We turn now to consider the eleven applications for certification where pre-hearing representation votes have already been held. It is perhaps worth noting at this point that two of the votes were conducted on April 16th, two on April 19th, four on April 30th and three on June 4th, 1977.

51. The mere fact that votes have already been held with respect to these applications does not foreclose the possibility that the Board might direct the taking of a series of second votes. The Board has in fact directed the taking of second votes on a number of occasions in the past, most frequently where irregularities have occurred with respect to either the taking of the first vote or the "no propaganda" period prior to the vote. Indeed with respect to two of these applications, namely those involving Frid Construction Company Limited and Robertson-Yates Corporation Limited, Local 298 has requested that the votes be set aside on the basis of certain alleged violations of the no-propaganda period. The Board has yet to hear any evidence with respect to these alleged violations.

52. The Board has only on rare occasions directed the taking of a second representation vote in instances where a vote was held to determine which of two unions was to represent a unit of employees and where no irregularities had occurred with respect to holding of the first vote. Indeed, except in extreme situations the Board has not perceived its role as being to "police" the claims of the parties either during an organizational campaign or in the period prior to the taking of a representation vote. Instead the Board relies upon the ability of the employees to assess the various claims put forward and to reach their own conclusions as to how they wish to vote. The Board outlined this approach in the *Stauffer-Dobbie Manufacturing Co. Ltd.* case, 59 CLLC ¶18,187 as follows:

"A new vote will generally be directed where the action complained of is coercive in nature or if ways and means of destroying the secrecy of the ballot or the confidence of the employees in the secrecy of the ballot are suggested or implied. ... So also where there is an attempt to influence voters by drawing inferences based on speculation as to what motivated the Board or a member of the Board in arriving at its or his conclusions. ... In the main, however, a considerable amount of leeway is permitted to electioneering. The Board does not undertake to police election campaigns or to consider the truth or falsity of campaign literature and speeches unless the ability of the employees to evaluate such literature or speeches is impaired, e.g., by the use of campaign trickery, to such an extent that the free desires of the employees cannot be deter-

mined in a secret vote. One cannot pay too much attention to either the most fallible voter or the one of firm convictions. One can only look at the circumstances of each case and, on the facts presented, determine whether the statements objected to are of such a nature that they are likely to have seriously misled a 'reasonable voter' ”.

53. An example of a case where the Board did direct the taking of a second vote where employees had been given a choice between two unions was in the *Joseph Gould and Sons Ltd.* case, 52 CLLC, ¶17,039. In that case one of the unions charged the rival union with being anti-semitic at a point in the election campaign so late that the other union had no opportunity to respond.

54. We turn now to consider individually the allegations raised by counsel for Local 298 in support of his contention that the Board should direct the taking of a second round of representation votes.

55. Counsel for Local 298 submitted that Mr. McGregor had betrayed his position of trust by not revealing to the members of the local both the facts concerning the proposed augmentation of Local 298's territorial jurisdiction, and also that it had been stated that any mergers of locals would be on a voluntary basis only. As indicated above, we accept that Mr. McGregor did warn the members of Local 298 of possible future mergers of the locals and that at no time did he seek to assure the members that any mergers would be on a voluntary basis only. Contrary to the position of counsel for Local 298, however, we are of the view that Mr. McGregor did inform the membership about the proposal that Local 298's territorial jurisdiction be enlarged, although he clearly did not stress this particular point to the members. Using the above quoted statement from the *Stauffer-Doubbie Manufacturing* case as a guide, we are of the view that for the Board to set aside the votes already held on the basis of McGregor's failure to inform employees that any merger of locals would be on a voluntary basis only, as well as his failure to stress the proposed extension of the local's jurisdiction, would require a conclusion on our part that Mr. McGregor by these actions misled the employees and also that this resulted in a situation where the ability of the employees to evaluate the positions of the parties was impaired and remained so impaired at least up until the time that the votes were conducted.

56. With respect to the question of union mergers, it is clear that the feeling amongst the Ontario Locals of the Operative Plasterers' Union was that any mergers should be undertaken on a voluntary basis only. However, it is equally clear that various officers of the International Union favoured some form of restructuring of locals in the Province, and that these included the General President who was on record as favouring one province-wide local. In these circumstances, and having regard to the possibility of enforced mergers under the union's constitution, while we certainly have some doubts as to the correctness of Mr. McGregor's views we do not feel that we are in a position to make a positive finding that Mr. McGregor misled the employees in this regard. We likewise do not feel that we are in any position to conclude that Mr. McGregor's failure to stress the proposed enlargement of Local 298's territorial jurisdiction somehow misled the employees. The mere enlarging of the local's territorial jurisdiction would not automatically bring with it any additional bargaining rights, and indeed it is possible that any attempts to exercise jurisdiction in the new areas might be resisted by the International Union of Bricklayers and Allied Craftsmen. Even counsel for Local 298 conceded that the worth of the proposal would depend upon the

organizing ability of the Local. In these circumstances it would amount to little more than an exercise in sheer speculation for the Board to try to assess whether or not Mr. McGregor had misled the employees by downplaying some major benefit to the local.

57. Even if the Board were to assume that the employees had, in fact, been misled by Mr. McGregor with respect to the issue of union mergers and the proposed territorial extension, can it be said that the employees had been misled to such an extent that their ability to evaluate the positions of the parties was impaired up to the time of the taking of the votes? We think not. Subsequent to Mr. McGregor's departure from Local 298 and prior to the taking of the votes the representatives of the local and the International Union had an opportunity to put forward their views to the employees with respect to these issues. Indeed as early as April 6, 1977 Mr. Mariano in addressing a meeting of the members of Local 298 told those present that the local would not be forced into any mergers and also that the local's territorial jurisdiction was going to be extended. This being the case it was open for the employees to assess for themselves what they felt to be the truth with respect to the merger and territorial extension issues, and also to decide what weight to give to those issues in deciding which union to cast a ballot in favour of in the pre-hearing representation votes.

58. Before leaving this point, it is perhaps worth noting that there is some indication in the evidence that the failure of Mr. McGregor to assure the employees that any mergers would be on a voluntary basis only might not have had the impact on the employees claimed for by counsel for Local 298. Indeed employees seem to have acted as a result of a number of considerations. This is most clearly brought out by the actions of Mr. Teixeira and Mr. Jack. Mr. Teixeira attended the meeting of the various locals on November 28, 1976 at which the steering committee set up with respect to the proposed Provincial Conference recommended that any local mergers be done on a voluntary basis only and also that the territorial jurisdictions of the locals be extended. Thus it cannot be said that Mr. Teixeira's ability to evaluate the situation had been impaired by anything said or not said by Mr. McGregor. At the meeting of the membership of Local 298 on February 17, 1977, however, Mr. Teixeira agreed to serve on the Local 298 committee which was to meet with the other unions and he acted as the chairman of that committee. Both Mr. Teixeira and Mr. Jack were present at the meeting of the locals on February 26, 1977 where the issue of mergers was again discussed. Despite this, Mr. Teixeira remained a member of the Local 298 committee and met with representatives of Labourers' Local 837 and of the local of the carpenters, and both of these men later signed applications for membership into Labourers' Local 837.

59. In summary, we do not feel on the basis of the evidence before us that we can make a positive finding that Mr. McGregor misled the employees with respect to the issues of local mergers and the proposal to extend Local 298's territorial jurisdiction. In the alternative, we are not satisfied that at the time of the taking of the pre-hearing representation votes the ability of the employees to assess the positions of the parties with respect to these issues would have been impaired. This being the case, we do not regard these matters as a proper basis for directing the taking of a new round of representation votes.

60. With respect to the pension plan, it is alleged that Mr. Mancinelli's portrayal of the availability of past service credits was inaccurate and further that he should have informed the men that if there were any great increase in past service liabilities the plan would become actuarially unsound thus necessitating changes to the plan. The pension plan in-

volved is the construction benefit plan of the Labourers' Pension Fund of Central and Eastern Canada. The plan does, in fact, provide that under certain conditions periods of employment worked by an employee prior to the time when any contributions are made on his behalf into the fund may be credited towards pension benefits. Mr. Mancinelli, both at the meeting on March 10th and when testifying before the Board, gave a rather liberal interpretation of the provisions regarding the granting of past service credits, and it was this interpretation which counsel for Local 298 claimed to be inaccurate and misleading of the employees. Further, the terms of the pension plan do provide that the trustees of the plan can amend or modify the plan in accordance with the terms of the Agreement and Declaration of Trust which established the pension Plan Fund and they also indicate that the trustees are to take cognizance of the actuarial soundness of the fund.

61. Can it be said, however, with any assurance that Mr. Mancinelli in fact misled any of the employees? We think not. Granted Mr. Mancinelli liberally interpreted the provisions of the pension plan regarding past service credits, but as it turns out Mr. Mancinelli is one of the five trustees of the plan who are charged with determining the amount of past service credits which will be allotted to individual pension claimants. Mr. Mancinelli also testified that he had helped set up the predecessor of the current pension plan. With respect to the issue of the actuarial soundness of the pension plan, we would note that there is no evidence before the Board as to the ability of projected future income and accruals of the fund to cover any increase in potential benefits arising out of increased past service credits or, indeed, any evidence at all as to the funding methods employed by the plan. In these circumstances the Board, even assuming it was inclined to do so, is in no position to evaluate Mr. Mancinelli's claims with respect to the pension plan. For the Board to even attempt to do so would again be for it to engage in an exercise of sheer speculation.

62. Evaluation of the pension plan and of the weight, if any, to be given to the statement made about the plan is something best left to the employees themselves. Those employees who had any concerns or questions about the plan could have sought out additional information concerning it. Employees who signed applications for membership into Labourers Local 837 were, in fact, sent a booklet by the union containing a summary of the plan as well as a reproduction of certain of the rules regarding the determination of benefits, including those rules regarding the granting of past service credits. The evidence does not indicate whether these booklets were received by the employees prior to the holding of the votes. However, even assuming they were not distributed in time, the existence of the booklets indicates that the detail concerning the plan were available to those who might have gone inquiring after them. One employee who testified, Mr. Ross Jack, in fact stated that on his own initiative he had obtained and read a copy of the booklet, and that having done so he came to doubt some of Mr. Mancinelli's statements concerning the plan.

63. In summary, it was for the employees to evaluate the statements made by Mr. Mancinelli concerning the pension plan and it was for them to decide what weight, if any, to give to those statements when deciding how to mark their ballots. The Board is not in any position, even if it were inclined to do so, to rule upon the accuracy or possible misleading nature of any of the statements made with respect to the pension plan. This being the case we do not view these statements as being grounds for the directing of a new round of representation votes.

64. We turn now to consider the submissions of counsel for Local 298 with respect to

Mr. McGregor's departure from Local 298. In support of his position counsel relied upon the alleged failure of Mr. McGregor to inform the members of the local of the fact that he had a discussion with Labourers Local 837 with respect to possible future employment. As indicated above, we are of the view that Mr. McGregor felt that he had been offered a job with Local 837. However, as also previously noted, we accept the uncontradicted statement of Mr. McGregor that he had told those members of Local 298 in attendance at the meeting held on February 17, 1977, that he had been offered a job by Labourers' Local 837.

65. Closely related to the issue of Mr. McGregor's job discussions with Labourers' Local 837 is the manner in which both he and Mr. Wilson, the president of Local 298, resigned from their positions with the local. The placing of their resignations in a filing cabinet would certainly not have served to inform the membership that they had broken their ties with the local. While Mr. Wilson ceased any active involvement with the employees at this point, Mr. McGregor of course did not, and the lack of publicity which he gave to his resignation may at first have misled some of the employees as to his true status. We certainly do not condone the manner in which Mr. McGregor resigned from the local or the fact that telephone calls to Local 298 were transferred to the Labourers' Hall prior to this practice being stopped by Mr. Mariano. However, both Mr. McGregor's resignation and his involvement with Labourers' Local 837 did come out into the open prior to the taking of the pre-hearing representation votes. After his return from Florida on March 19, 1977, Mr. McGregor openly aligned himself with the Labourers' Local 837. At his meeting with Mr. Mariano and Mr. Roots on March 22nd, Mr. McGregor made it quite clear that he had severed his ties with Local 298. On March 28th Mr. McGregor attended at a pre-hearing representation vote meeting and at that time indicated to Mr. Mariano that he was attending on behalf of Labourers Local 837. At the meetings of the membership of Local 298 addressed by Mr. Mariano, Mr. Mariano had an opportunity to both explain and express his own opinions with respect to Mr. McGregor's actions. At the membership meeting of April 11th, Mr. Mariano made a point of asking Mr. McGregor, before the members present, if he had resigned from Local 298, and Mr. McGregor replied that he had. Having regard to these factors, we are of the view that both Mr. McGregor's resignation and his support for Labourers' Local 837 were likely to have become common knowledge among the employees prior to the time when they came to cast ballots in the Board supervised votes. Particularly noteworthy in this regard is the fact that the Local 298 did not call any evidence to show that by the time they cast their ballots any of the employees were unaware of Mr. McGregor's decision to leave Local 298 and to support Labourers' Local 837. This being the case, we do not believe that Mr. McGregor's actions in this regard are grounds for directing the taking of another round of representation votes.

66. In summary, we are of the view that with respect to those cases where pre-hearing representation votes have been conducted, Local 298 has not demonstrated that the employees were misled to such an extent that at the time when the votes were conducted their ability to evaluate the positions of the parties was impaired. This being the case, we are of the view that the employees were able to decide what weight, if any, to give to the various statements made to them and also what importance to give to the various issues when deciding how to mark their ballots. As a result, we reject the submission of Local 298 that the Board should conduct a second round of representation votes with respect to all of the files where such votes have already been held.

67. The Registrar is directed to list these matters for hearing. The purpose of the

hearing is to hear the evidence and the representations of the parties with respect to all outstanding matters arising out of and incidental to the applications, including the allegations raised in File No. 2094-76-R (Robertson-Yates) and File No. 2095-76-R (Frid Construction) that the applicant violated the Registrar's direction that interested persons refrain from propaganda and electioneering for 72 hours prior to the date on which the pre-hearing representation votes were taken.

1478-77-R Canadian Textile and Chemical Union, (Applicant), v. Harding Carpets Limited, Collingwood, Ontario, (Respondent), v. Amalgamated Clothing and Textile Workers Union, (Intervener).

Certification – Membership Evidence Practice/Procedure – Whether allegation of irregularities must be resolved before vote is held.

BEFORE: M.G. Picher, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

DECISION OF THE BOARD: January 10, 1978.

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
4. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent at Collingwood, save and except, fixers, assistant foremen, persons above that rank, industrial nurse, office staff and security guards.
5. All employees of the respondent in the voting constituency on the 4th day of January, 1978, who have not voluntarily terminated their employment or who have not been discharged for cause between the 4th day of January, 1978 and the date the vote is taken will be eligible to vote.
6. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.
7. By letter dated December 22, 1977 counsel for the intervener has alleged irregularities in the gathering of certain of the membership evidence filed by the applicant. On

that basis the intervener asks that the Board not proceed to the taking of the vote pending a determination as to whether the applicant has the requisite membership of not less than 35 per cent of the employees in the voting constituency.

8. The normal practice of the Board in these circumstances is to proceed to the taking of the vote with the instruction to the Registrar that the ballot box be sealed pending a resolution of the allegations made. That practice reflects the legislative policy that the pre-hearing vote be available as an expedited means of application whereby the wishes of the employees may be determined at the earliest possible date. In that regard it should be noted that the Board's jurisdiction to order the taking of the vote is not predicated on the condition that it be conclusively satisfied that the membership evidence filed meets the threshold standard of not less than 35 per cent. Subsection (2) of section 8 provides:

(2) Upon such a request being made, the Board may determine a voting constituency and, if it *appears* to the Board on an examination of the record of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

Thus at the stage of proceedings where the Board decides whether to order the taking of a pre-hearing vote a lesser standard of evidence applies and the Board need not be finally satisfied of the strength of the applicant's membership position in order to take a vote, as it must before it issues a certificate (cf. section 7(2) & (3) of the Act).

9. If through the Board's inquiries, the intervener's allegations are ultimately found to be well founded the Board may conclude that the threshold membership requirement was not in fact met. It would then dismiss the application rather than order that the ballots be counted. By that procedure there would ultimately be no prejudice to the intervener. A delay of the vote in the face of what might later be shown to be unfounded allegations of fraud in the membership evidence could, on the other hand, prejudice the applicant.

10. The Registrar is therefore instructed to proceed with the taking of the vote, the sealing of the ballot box and the listing of this matter for hearing on the earliest convenient date thereafter. The purpose of the hearing will be to deal with the intervener's allegations and any other issues that may then be outstanding.

1139-77-R Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), and, **Crenmar Services Limited**, (Respondent), and, Group of Employees, (Objectors).

Certification – Membership Evidence – Whether conduct of organizing campaign raises doubts as to whether the membership evidence reflects the true wishes of employees.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members C.G. Bourne and P.J. O’Keeffe

APPEARANCES: *Harold Caley and William Reilly for the applicant; D.I. Wakely and John H. Feeney for the respondent; Steve Chandler and Michael Ouellette for the objectors.*

DECISION OF THE BOARD: January 24, 1978.

1. The name “Crenmar Services Ltd.” appearing in the style of cause of this application as the name of the respondent is amended to read “Crenmar Services Limited.”
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties the Board finds that all employees of the respondent working at or out of Metropolitan Toronto, save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. For the purposes of clarity the Board declares that employees of the respondent working in Brampton come within the bargaining unit.
6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 7th November, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
7. There was filed with the Board two statements of desire in opposition to the application. One of the statements was signed by only one employee and that employee did not attend at the hearing in support of his statement of desire. The second statement of desire takes the form of a “petition” signed by 22 employees in the bargaining unit, 10 of whom had signed applications for membership into the applicant trade union. If the Board were to accept this petition as a voluntary expression of employee desires then the “overlap” between the employees who had applied for membership into the applicant union and those

who had signed the statement of desire would be sufficient to cause the Board to be uncertain as to whether or not as of the terminal date more than 55 per cent of the employees in the bargaining unit actually desired to be represented by the applicant trade union. Under such circumstances the Board would likely exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. (See: *The Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237.)

8. Before it will accept any statement of desire filed in opposition to an application for certification as a voluntary expression of employee desires, the Board requires first hand evidence concerning both its origination and circulation. It does so out of a frank recognition that because of the responsive nature of an employee's relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influences which may operate to impair or destroy the free exercise of his rights under the Act. (See: *Pigott Motors (1961) Ltd.*, 63 CLLC ¶16,264.) The Board is always particularly concerned that the "change of heart" indicated by employees when they sign a statement of desire in opposition to a trade union after earlier applying for membership in that same union represents a free and voluntary choice on the part of the employees unimpeded by any possible overt or subtle management pressures or by any threats, direct or implicit, to employee job security.

9. Although 22 employees signed the petition, only Mr. Steven Chandler testified as to its origination and circulation. Neither the applicant nor the respondent called any witnesses with respect to the petition.

10. In response to a question from the Board, Mr. Chandler stated that he had been the one to write the heading on the petition. During cross-examination he at first repeated this statement, but subsequently he acknowledged that another employee had in fact written the heading.

11. In answer to a question from applicant's counsel, Mr. Chandler stated that he had telephoned an employee by the name of Steve Allen concerning the petition. Mr. Chandler stated that he was certain that he had obtained Mr. Allen's home telephone number from the "411" information operator. Later, when asked if he had made use of a list of employee names when circulating the petition, Mr. Chandler indicated that he had in fact utilized such a list. Asked how he had obtained such a list, Mr. Chandler at first replied that a secretary had given it to him, although he later changed his testimony in this regard and stated that he had taken it out of the secretary's desk without her knowledge. The next question asked of Mr. Chandler concerned the possibility that employee telephone numbers might have been included on the list. Mr. Chandler acknowledged that such was the case, and then he went on to add "that's actually where I got Steve Allen's number." In response to a comment from applicant's counsel concerning Mr. Chandler's prior testimony as to how he had obtained Mr. Allen's telephone number, Mr. Chandler indicated simply that he had been waiting to see if applicant's counsel would raise the matter of the list of employees.

12. During his cross-examination Mr. Chandler stated that he had "heard drifts" of a rumor that if the applicant union were to be certified the respondent would close down its operations. When asked if he had told employees this when approaching them to sign the petition, Mr. Chandler responded that he did not repeat rumors. Asked whether Mr. Michael Ouellette, an employee who accompanied Mr. Chandler for part of the time when he

was acquiring signatures, might have made such a statement to the employees, Mr. Chandler replied that he could not recall if Mr. Ouellette had done so.

13. Mr. Chandler's memory also failed him when he was asked if he had told an employee by the name of Doug Rodgers that if Mr. Rodgers did not sign the petition Mr. Chandler would break his neck. If he did make such a statement, volunteered Mr. Chandler, it would have been said only in a joking manner.

14. In the course of giving his testimony Mr. Chandler in effect conceded that he had deliberately lied under oath with respect to the issue of how he had obtained Mr. Allen's home telephone number. The Board recognizes that such conduct, although reprehensible, need not necessarily lead to a conclusion that all of Mr. Chandler's testimony should be rejected. (See: *Latour v. The King* [1951] 1 DLR 834, [Supreme Court of Canada.]) However, a number of other aspects of Mr. Chandler's testimony have also caused the Board serious concern. These include the inconsistencies in his testimony regarding both the issues of who drafted the petition and as to how he had obtained the list of employees. Further, it is clear that Mr. Chandler had no intention of mentioning his use of a list of employees until he was certain that counsel for the applicant was aware of its existence. Mr. Chandler stated that he could not remember if Mr. Ouellette had warned employees that if the applicant were certified the respondent would go out of business. He also stated he could not remember if he had told an employee he would break the employee's neck if he did not sign the petition. The Board is of the view that neither of these statements is of the type which would pass in the normal course of conversation such that a reasonable person would not recollect whether they had been made or not. If statements of this nature had been made, they most likely would have been remembered. If they had not been made, a reasonable person would recollect this to have been the case. In short, the Board is of the view that it simply cannot accept Mr. Chandler's statement that he could not recollect if such statements had been made. This being so, the Board can only conclude that Mr. Chandler was seeking to avoid giving the true answers to the questions – answers which would not be favourable to his position. It goes almost without saying that the Board was not impressed by Mr. Chandler's comment that any statements he might have made concerning his breaking Mr. Rodgers' neck would have been made in a joking manner. Having had an opportunity to assess Mr. Chandler's physical stature, The Board is of the view that no reasonable person would take a threat of physical violence by Mr. Chandler lightly – no matter in what tone of voice the statement may have been made.

15. Faced with Mr. Chandler's deliberate lie, his evasion of questions and his attempts to hide the truth from this Board, the Board has concluded that it is simply unable to give any credence to any of Mr. Chandler's testimony. This being the case, and having regard to the fact that no other employee testified in support of the petition, the Board has before it no evidence upon which it can conclude that the petition represents a voluntary expression of the employees who signed it. This being the case, the Board declines to exercise its discretion and direct the taking of a representation vote on the strength of the petition.

16. Quite apart from the question of what weight should be given to the petition, counsel for the respondent submitted that the Board should exercise its discretion and direct the taking of a representation vote due to certain statements made to employees during the course of the applicant's organizing campaign. In support of this submission counsel called Mr. Ouellette to testify as a witness. Mr. Ouellette stated that on a date he could not

remember, he and some 4 or 5 other employees were gathered together in a room when he was approached by Mr. Ken Davis, an employee in the bargaining unit, and asked to sign an application for membership into the applicant trade union. Mr. Ouellette stated that "a voice" then said "you can sign now for two dollars, but once the union gets in it will cost up to a hundred and fifty dollars." Mr. Ouellette testified that he could not see who made the statement, although it is clear from his testimony that it could only have been made by one of the other employees present in the room. Mr. Ouellette stated that it was the reference to the money which caused him to sign the application for membership. During cross-examination Mr. Ouellette conceded that he had earlier expressed a desire to become a union steward. He also indicated that he had only raised the matter of the statement being complained of after hearing of a rumor concerning the possible closing of the respondent's business.

17. On the basis of Mr. Ouellette's testimony, counsel for the respondent contended that it was evident that Mr. Ouellette had signed an application for membership into the applicant union for other than valid reasons. He further contended that one could not be certain as to whether any other employees had signed a membership application for the same reason. In support of his position that because of these considerations the Board should direct the taking of a representation vote, counsel referred to the Board's decision in the *Alex Henry & Son Ltd.* case, [1977] OLRB Rep. May 288.

18. In the *Alex Henry* case, a union official had advised a group of employees that if they joined the union at that time they could do so for a fee of two dollars, but that if they joined at a later date it would cost them fifty dollars. The Board in that case was of the view that a reasonable employee hearing the union organizer might well have concluded that upon the union being certified he would have no alternative but to pay the higher fee if he wanted to keep his job, and that such view might have led to a signing of a membership application. This conclusion, in turn, raised some doubts with the Board as to whether the membership evidence filed was an expression of the true wishes of the employees, and as a result the Board directed the taking of a representation vote. In the course of its decision the Board referred to its policy of requiring that union officers follow the highest standard of integrity in soliciting, gathering and presenting to the Board evidence of membership.

19. The Board is of the view that the facts in the *Alex Henry* case are distinguishable from the facts before us in the instant proceedings. Unlike the situation in the *Alex Henry* case, the statement complained of here was made not by an official of the union but rather by an employee in the bargaining unit. Further, having regard to the fact that at the time when the unidentified employee made the statement complained of, Mr. Ouellette was talking directly to Mr. Davis, it seems highly unlikely that Mr. Davis, the "in-house" employee organizer, could have been the one to make the statement. This being the case the Board can only conclude that the statement was made by a rank-and-file employee.

20. Unlike the situation with a union official, a rank-and-file employee is not in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Further, employees upon hearing any statements made by rank-and-file employees concerning what a union might do in the future can always check out the accuracy of those statements with a responsible union official before signing a membership application. Having regard to these considerations, the Board is generally less willing to infer that a reasonable employee is likely to be properly influenced into signing a membership

card on the basis of statements made by a rank-and-file employee than it is with respect to statements made by a union official. (See: *Canadian Electric Box and Stampings Limited*, [1964] OLRB Rep. Sept. 284; *Green Giant of Canada Limited*, [1973] OLRB Rep. June 376 and *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. 611.) In the instant case the Board is likewise not satisfied that reasonable employees were likely to have been misled by what was said by the unidentified rank-and-file employee. This being the case, the Board declines to order a representation vote on the basis of any concern that employees generally may have been misled into signing membership applications.

21. Despite the above conclusion with respect to employees generally, the fact remains that Mr. Ouellette testified that he had signed an application for membership because of what had been said about the monetary payments. If the Board were to accept this statement as correct (and in this regard the Board would note that the statement appears to become a union steward), nevertheless even discounting the membership application signed by Mr. Ouellette the applicant would have as members more than 55 per cent of the employees in the bargaining unit. This being the case, the Board declines to direct the taking of a representation vote on the basis of the reasons stated by Mr. Ouellette as to why he had signed a membership application.

22. A certificate will issue to the applicant.

0423-77-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant), v. **Nel-Gor Castle Nursing Home**, (Respondent).

Discharge for Union Activity – s. 79 – Change in Working conditions – Whether failure of employer to maintain employee in a position for which she was overqualified was motivated by anti-union animus or constituted an alteration of working conditions

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members F.W. Murray and D.B. Archer.

APPEARANCES: *Ted Wohl, Al Campbell and Laurie Goetz for the applicant; W.J. McNaughton, R.H. Nelson and R. Gordon for the respondent.*

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER F. W. MURRAY: January 11, 1978.

1. This is a complaint under section 79 of The Labour Relations Act. The complainant union alleges that the grievor, Ms. Laurie Goetz, has been discharged by the respondent contrary to the provisions of section 58(a) of the Act. The union further alleges that the respondent employer has violated section 70(2) of the Act.

2. Mr. Riley Nelson and Mr. Rudolph Gordon are co-owners of the Nel-Gor Castle Nursing Home. Mr. Nelson is responsible for the financial operation of the home, while Mr. Gordon is responsible for the day-to-day operation of the home.

3. Mr. Gordon testified that on March 10, 1977 he hired Ms. Goetz, a registered nurse (R.N.), to fill a registered nursing assistant's (R.N.A.) position. Mr. Gordon stated that when he hired Ms. Goetz he explained that her employment was on a three month temporary basis and that if an R.N. position became available he would hire her permanently for that position. Mr. Gordon hired Ms. Goetz to work in the Brentwood Nursing Home which was licensed for forty-seven beds. At the same time, however, the respondent was in the process of constructing a replacement nursing home, the Nel-Gor Castle Nursing Home, which was to be completed on April 15, 1977 and was built for seventy beds. Mr. Gordon testified that when he hired Ms. Goetz he anticipated that an R.N. position would become available because of the increased bed capacity at the new home.

4. On April 14, 1977, however, the Ministry inspected the new facility and refused to give its approval for more than sixty beds. Until this date, Mr. Nelson and Mr. Gordon had been hopeful that they would receive Ministry approval for seventy beds and had hired sufficient staff at Brentwood to meet the needs of a seventy bed facility at Nel-Gor.

3. Both Mr. Gordon and Mr. Nelson testified that as soon as the Ministry refused its approval of more than a sixty bed facility at Nel-Gor, they made the decision to reduce their staff to meet the minimum requirements for a sixty bed facility. This meant retaining three R.Ns. and three R.N.As. In the middle of April they had four R.Ns. and three people employed as R.N.As. One R.N. informed the respondent that she would be leaving in June; thus, by ordinary attrition, Mr. Gordon had the appropriate R.N. complement. Although Mr. Gordon had the proper number of R.N.As. he testified that he was concerned because one R.N.A., Ms. Goetz, was qualified as an R.N. and working at a higher salary than that ordinarily paid to R.N.As.

4. On April 5, 1977, Mr. Gordon received a letter from a Ms. Karen Gordon (unrelated to Mr. Gordon) enquiring about a position as an R.N.A. He testified that on the Sunday after he learned that the home would not be licenced for more than sixty beds, he contacted her for an interview which took place on April 23, 1977. During the interview she said that she would be available in June and that she wanted to work between June 24th and September 5th, 1977. Mr. Gordon testified that he told her at the interview that she could have the job but that she would first have to have a medical examination and chest x-ray. Copies of these examinations were received by Mr. Gordon on June 1st. Two days later Mr. Gordon fired Ms. Goetz.

5. Ms. Goetz testified that the termination interview took the following course: Mr. Gordon asked her if it was still understood by her that when she was hired, she was hired as an R.N.A. When she said yes, he said, "From now on we're going to use R.N.As. for R.N.A. positions so that after today we don't need you as an R.N.A.". He went on to say, "We're going to follow Ministry regulations to have R.N.As. for R.N.A. positions and R.Ns. for R.N. positions so that after today I won't need you". When Ms. Goetz asked if he meant she was fired he said, "Yes, it's unfortunate". By Ms. Goetz's account, which the Board accepts, Mr. Gordon did not mention in this interviews the problems of her being over-qualified, of having to save costs or of a lack of work; nor did he ask her whether she would agree to work for regular R.N.A. wages instead of the slightly increased wage she was receiving at that time. (We note that no evidence was presented to substantiate the assertion that Ministry regulations required that the respondents employ R.N.As. rather than R.Ns. for R.N.A. positions; in the absence of such evidence the Board assumes that there are not regulations prohibiting an R.N. from being employed as an R.N.A.)

6. Ms. Goetz testified that she did not believe she was fired because Mr. Gordon had decided to enforce Ministry regulations; she believes she was asked to leave because she had been active in forming the union. In discussing her union activity, Ms. Goetz stated that on May 9, 1977 she contacted a union representative. He came to her apartment on May 14th to discuss the possibility of the employees being represented by a union. At this meeting, she and a few other people signed union cards. In the days following she signed up approximately seven to eight employees.

7. In explaining his reasons for firing Ms. Goetz, Mr. Gordon testified that she was the most junior employee, a fact undisputed by the applicant. He further explained that he did not want to keep an over-qualified person working as an R.N.A. for fear that as soon as she could find a position as an R.N. she would leave her employment at Nel-Gor. Mr. Gordon explained that he had previously had this happen with over-qualified nurses aids. He testified that another factor in terminating Ms. Goetz at that time was that he wanted to take advantage of the three month period available under *The Employment Standards Act* during which an employer may terminate an employee without providing notice.

8. When asked why he did not terminate Ms. Goetz on April 15th, when he first knew that he would have to reduce his staff, he testified that in moving the nursing home from the old facility to the new facility he felt he could use extra staff. He further testified that he did not want to dismiss Ms. Goetz until he had secured a replacement for her, something which occurred on June 1st when he received Ms. Gordon's medical report. When asked why he didn't ask Ms. Goetz whether she would be willing to accept a pay reduction and thus work for the normal R.N.A. salary, he stated that even if she had agreed to do so he would still have been concerned that she would have left as soon as she had had the opportunity to do so.

9. Mr. Nelson testified that, while the decision to cut staff was taken on April 15th, as soon as they were denied approval for a seventy bed unit, the decision to terminate Ms. Goetz in particular was not made until approximately the 20th of May, or the termination of the pay period immediately preceding her actual termination date on June 3rd. Mr. Gordon, on the other hand, testified that he thought the decision to fire Ms. Goetz was made shortly after April 15th. He was uncertain of this date, however, and was only sure that on April 15th he and Mr. Nelson made the general decision to cut staff. The Board found both Mr. Nelson and Mr. Gordon to be credible witnesses; it may well be that in April Mr. Gordon, who worked more closely with the staff, singled Ms. Goetz out in his own mind as the prime candidate for termination but didn't make the ultimate decision until late May. When asked why they didn't inform Ms. Goetz on May 20th that she wouldn't be needed after June 3rd, Mr. Nelson gave two reasons: firstly, that the law didn't require them to give her notice and secondly, that they wanted to be sure they had secured a replacement before she left; they were afraid that if they informed her on May 20th she would leave immediately.

10. The application for certification was dated May 20th, 1977. The letter to the employer informing them of the application for certification was sent to the parties on May 24th, 1977. We can presume, therefore, that the employer received notice of this application a few days following, approximately May 26th, 1977. Both Mr. Nelson and Mr. Gordon testified that at the time the decision was made to discharge Ms. Goetz they were not aware that she had been involved in the union campaign and that they first found out about the organizing campaign when they received the notice from the Board. Both denied discharging her because of her union activities.

11. In a complaint of this nature to which the provisions of section 79(4a) apply, the employer must satisfy the Board that in discharging the grievor it was not motivated by anti-union animus.

12. Counsel for the complainant characterized the grounds of discharge given by the employer as unbelievable and inconsistent. He noted, for example, that when they actually discharged Ms. Goetz on June 3rd, Mr. Gordon gave as the justification their decision to meet Ministry regulations by hiring R.Ns. for R.N. positions and R.N.As. for R.N.A. positions. Counsel for the complainant directed the Board's attention to the termination slip noting that the reason for the dismissal given thereon was "termination of employment during the probationary period", a reason that was not mentioned to her when she was actually fired. Counsel then noted that at the instant hearing the predominant reason for firing Ms. Goetz revealed itself to be the cutting of costs by only paying the R.N.As. the minimum rate, another reason not mentioned to her at her termination interview. Counsel suggests that if saving costs was the real reason for discharge, it would have been noted on the termination slip and she would have been asked to work at a lower rate.

13. Counsel for the complainant juxtaposed the alleged inconsistency of these reasons with the coincidence of the timing between the discharge and the application for certification. Counsel asked the Board to consider as well the agreed fact that the employer had no complaint with Ms. Goetz's work.

14. Contrary to the suggestion by counsel for the complainant, the Board finds that the three sets of reasons given for Ms. Goetz's discharge are consistent with one another and is satisfied that together they form the total picture of the actual reasons for discharging Ms. Goetz. In making the decision to cut staff to meet the minimum requirements for a sixty bed unit, Mr. Gordon and Mr. Nelson have satisfied the Board that they were primarily concerned with cutting costs. In deciding who specifically should be discharged, the Board is satisfied that the decision was based on seniority as well as on the fear of retaining an over-qualified individual. While the Board may be of the view that it would have been fairer to Ms. Goetz to at least ask her if she would be willing to work for a lower salary and seek to get some assurance from her that she would not leave them abruptly, the respondent's general ethics are not in issue in this case. The Board is further satisfied that in deciding to discharge Ms. Goetz on June 3rd, they were pre-occupied with the fact that if she were retained after that point they would have had to provide her with termination notice. Once again, while the Board may not approve of a sudden termination without notice, that problem does not find its remedy in this forum.

15. In deciding that the respondent's reasons for discharge were not contaminated with an anti-union motive, the Board is mindful of the fact that the respondent had decided to hire Ms. Gordon as an R.N.A. before the organizing campaign began and that Ms. Goetz was advised of her termination two days after the respondent had received final confirmation that Ms. Gordon would be able to commence her employment with them. Additionally, the Board is satisfied that if there had been an R.N. position available Ms. Goetz would have been the recipient.

16. Although the organizing campaign and the application for certification closely coincide with the timing of the discharge, the Board notes that counsel for the complainant introduced no evidence to indicate that the respondent was, or even might have been, aware

of the existence of the organizing campaign or of Ms. Goetz's membership in the union. The Board accepts the evidence of Mr. Gordon and Mr. Nelson that they first learned of the organizing campaign around the 26th of May, some six days after they made the final decision to discharge Ms. Goetz.

17. On the basis of all the evidence, therefore, the Board is satisfied that in discharging Ms. Goetz, the respondent was not motivated by anti-trust animus and did not act in violation of section 58(a) of the Act.

18. Turning to the alleged violation of section 70(2) of the Act, the union contends that by initiating the condition that it would only hire R.N.As. for R.N.A. positions after receiving notification of the application for certification, the respondent changed its working conditions in contravention of section 70(2) of the Act.

19. Following the receipt of an application for certification, section 70(2) imposes the following freeze on employment relationships:

“... the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,
...”

The purpose of a freeze in the employment relationship following the notification of the application for certification is to maintain the status quo of the wages and all other terms and conditions of the contracts of employment in order to prevent disruptions in the employment relationship at the time the union is seeking to obtain bargaining rights. The freeze seeks to provide the union with a period of employment stability and tranquility as well as a fixed point of departure from which to establish its bargaining rights and commence its representation of the employees. In defining the scope of the freeze, the Board has repeatedly held that the freeze does not apply to matters which have been put into motion before the prohibition sets in even though they might only materialize after the freeze commences. (See the Board's decision in *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049 and the cases cited therein.)

20. No evidence was presented to the Board to indicate that the respondent had a general practice of employing R.Ns. as R.N.As. There is no evidence to indicate that prior to Ms. Goetz's employment an R.N. had ever been employed as an R.N.A. The respondent's refusal after the onset of the freeze period to employ R.Ns. in R.N.A. positions was not, therefore, an alteration of the general conditions of employment or expectations existing at the respondent's nursing home.

21. With respect to Ms. Goetz's specific employment arrangement, the Board accepts Mr. Gordon's uncontradicted evidence that Ms. Goetz was hired on the understanding that she would have a temporary position as an R.N.A. and that if an R.N. position became available she would be able to permanently assume that position. The Board further accepts that at the time Ms. Goetz was hired, Mr. Gordon anticipated that an R.N. position would become available for her because of the respondent's imminent move to the Nel-Gor Castle Nursing Home with its anticipated increased bed capacity.

22. The Ministry's refusal to grant approval in the new home for more than sixty beds disrupted Mr. Gordon's hiring plans and was the cause of his decision to reduce his staff. Once the capacity of the new home was cut back by the Ministry, Mr. Gordon could no longer anticipate that there would be an R.N. opening into which Ms. Goetz could move. The original expectation between Ms. Goetz and Mr. Gordon that an R.N. position would become available was frustrated by the Ministry's refusal to grant approval for a seventy bed home. This unexpected turn of events triggered the reverse application of the parties' original understanding that her R.N.A. position was temporary and that she would become a permanent R.N. if an R.N. position became available. The natural extension of their understanding was that if no R.N. position became available her temporary position as a R.N.A. would not necessarily become permanent. It was clearly not a condition of her employment that as a qualified R.N. she could anticipate a permanent position as an R.N.A.

23. The seeds of Ms. Goetz's dismissal were sown in the parties' original arrangement of her employment contract. The Board is satisfied, therefore, that the cause of her dismissal was a matter set into motion prior to the respondent's receipt of the application for certification and thus does not fall within the parameters of the section 70(2) freeze.

24. For the reasons given above, therefore, the application as it relates to both section 58(a) and section 70(2) of the Act is hereby dismissed.

25. The decision of Board Member D.B. Archer will follow.

**1106-77-U Canadian Food and Associated Services Union, (Complainant),
v. Windsor Arms Hotel Limited, (Respondent).**

Discharge for Union Activity – s. 79 – Effect of employer termination of apprentices – Whether discrimination because of union activity – Appropriate remedy where aggrieved employees had not right to continued employment in any event.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J.D. Bell and M.J. Fenwick.

APPEARANCES: *M. Swenarchuk, Wendy Iler and Steve Richard for the complainant; I.T. Bern and E.C. Forster for the respondent.*

DECISION OF THE BOARD: January 20, 1978

1. This is a complaint under section 79 of The Labour Relations Act. The complainant alleges that Wendy Iler and Steve Richard have been dealt with by the respondent contrary to the provisions of sections 56, 58 and 61 of the Act. The complainant requests that Iler and Richard be reinstated in employment with compensation for all monies lost. The respondent also requests the Board to issue a cease-and-desist order.

2. The details of the complaint allege that on or about October 7, 1977, the respondent, through Herbert Sonzogni, Executive Chef, terminated the employment of Iler as of October 21, 1977 and Richard as of October 16, 1977, contrary to the said sections of the Act.

3. Iler received notice of her termination by a letter dated October 7, 1977 which reads as follows:

“Please be advised that as of to-day our contract is terminated.

Since we have no openings for Journeyman cooks, please take notice that your employment with the Windsor Arms Hotel Ltd., is terminated as of the 21st of October 1977.”

Richard also received a letter of termination which bears the same date as that issued to Iler, although the effective date, as indicated above, is different. His letter reads:

“You passed the examination as a Journeyman cook, therefore our obligations have been fulfilled, congratulations.

Since we have no openings for Journeyman cooks, please take notice that your employment with the Windsor Arms Hotel Ltd., is terminated as of the 16th of October, 1977.”

4. The position of the respondent as set out in its reply to the application is as follows.

5. The respondent has conducted an apprenticeship programme in conjunction with the Industrial Training Branch of the Ministry of Colleges and Universities for some 10 years.

6. Iler and Richard were employed by the respondent and worked under the direction of its Executive Chef, Sonzogni, under *The Apprenticeship and Tradesmen's Qualification Act*, with a view to becoming journeymen cooks.

7. Generally speaking, under the Apprenticeship Act, a candidate is required to serve 6,000 hours in practical training and attend 15 weeks of schooling. The prescribed period of service and the passing of the required examinations lead to a Certificate of Apprenticeship and the designation of Journeyman or Cook II.

8. The complainant union commenced an organizational campaign among employees of the respondent on or about June 12, 1977. An application for certification was made and the complainant was certified as bargaining agent for a unit of full-time employees of the respondent at the Windsor Arms Hotel, Noodles Restaurant and the Bay Street Car on September 21, 1977.

9. There is no dispute that Iler took an active and prominent part in the organizational drive of the complainant and that her activities were known to Sonzogni. The latter, however, denied any knowledge of Richard's connection with the union, and stated that he was unaware of it until these proceedings were commenced.

10. Richard testified that in June 1977, the apprentices were dissatisfied with the manner in which they were being dealt with and he organized a protest together with a number of the apprentices, including Iler. He signed a lengthy letter in which was set out the various grounds of dissatisfaction. These involved a request for compliance with new statutory rates of pay and other matters pertinent to training and remuneration. The letter brought about a meeting, attended by Richard, other apprentices and Sonzogni, which resulted in the resolution of some, although not all, of the complaints. Also in attendance was a solicitor for the apprentices and a representative from the Department of Colleges and Universities.

11. Richard was an organizer for the union. In fact, he organized the first meeting at which cards were signed. He did most of the organizing at the hotel. On August 24, Richard distributed a leaflet in support of the union. He did not sign the leaflet, but at the end of the leaflet appears the name of the applicant union, followed on the final line by the words, "Phone Steve - 364-1022". Richard's evidence is that the phone number is his personal or home telephone number at which Sonzogni had often phoned him. A list of phone numbers of employees, including the above, was on a list in the window of Sonzogni's office. A further leaflet was issued around September 12 bearing the same name and phone number.

12. When the foregoing evidence is taken along with other evidence clearly establishing active opposition to the union by Sonzogni, particularly with respect to its organization of the cooks and apprentices, and the fact that he made it his business to inquire as to whether employees were members of the union or not, we are compelled to find that he was all material times fully aware that Richard was an active member of the applicant union.

13. The respondent argued that it had maintained a consistent position throughout the proceedings and this was that a totally uncontrolled fact had occurred, to wit, the expiry of the contracts of apprenticeship of Iler and Richard. These contracts expired when the requisite number of hours were completed and the obligation of the respondent to employ the two apprentices legally came to an end at that time. This was an event, the respondent argued, brought about by operation of the Apprenticeship Act, and whether the apprentices were union members or not could make no difference. Certainly, the respondent submitted, union membership did not expand or enhance the rights of the apprentices nor entitle them to any extension of the contractual period of employment.

14. The respondent adduced a considerable amount of documentary evidence in an endeavour to establish that the treatment afforded Iler and Richard was no different to that given to apprentices in the past who had completed their contracts. The evidence establishes that some apprentices were hired on as journeymen for various periods of time, some were recommended for employment elsewhere, and some were left to their own devices. The respondent took the position that there were not journeymen's jobs open at the time the contracts of Iler and Richard expired.

15. The respondent argued that in view of the latter fact and because it had its complement of apprentices, there were no jobs into which the two employees could be placed. They had completed the apprenticeship contracts and, the respondent maintained, could not be placed or paid in that category, nor could the Board direct that they be re-employed in the higher category of journeyman since that would be to promote them by order of the Board rather than to reinstate them in the positions they occupied at the time of their termi-

nation. In other words, the respondent argues, there is no remedy available because of the operation of the law with respect to the apprenticeship contracts and their expiry, and the fact that Iler and Richard are no longer apprentices.

16. There can be no doubt that the obligations of the respondent, arising under the Apprenticeship programme, were met when the requisite hours were completed. There was therefore no duty on the respondent, under the Apprenticeship Act, to continue either Iler or Richard in employment under *The Apprenticeship and Tradesmen's Qualification Act* and its regulations. That, however, is not the end of the matter and that is so by reason of the past practice upon which the respondent relies.

17. It is abundantly clear on the evidence that the treatment given to Iler and Richard at the completion of their apprenticeship hours differs from the norm. In the first instance, it had been customary for the respondent to keep apprentices in employment until they had written their examinations, notwithstanding the fact that their hours of service were completed. In the present case, Iler had not yet written her exams when she was given the notice of termination. It is interesting to note that Sozogni had only become aware of the fact that the respondent's obligation ceased when the hours were completed. He wasted no time in making use of this information in the case of Iler.

18. The termination of other graduate apprentices had generally been brought about through an interview with Sozogni when the graduate's future was talked about; and when the graduate was competent, his or her continued employment was discussed and a rate bargained about. In the present instance, Iler and Richard were terminated by letter. The termination letters, it is to be noted, are dated the same day, although the termination dates differ. The explanation offered for this change in procedure was that since the apprentices had written the letter of protest and had engaged a lawyer, formality seemed to be required. Even if that explanation be accepted, there remains the question as to why the two people who were active in the union's affairs were not given an interview and were terminated on the same date.

19. The Board is satisfied upon a review of the evidence that Iler and Richard were discriminated against by the respondent, in that they were not afforded the normal opportunity to discuss their future and the possibility of continuing in employment with the respondent if a rate could be agreed upon. It is abundantly clear that Iler is an excellent cook, and the fact that she was not interviewed can only be explained by the conclusion that, notwithstanding her qualification, Sozogni did not want her in his kitchen because of her union activities and connection. It is true that he undertook to recommend her employment elsewhere, but that only strengthens the view that it was her union connections that made her unacceptable to Sozogni and not the lack of his ability to find a place for her.

20. The case of Richard, from the point of view of his qualifications and abilities, is not as strong as that of Iler; nevertheless, he is qualified as a journeyman and there is no valid reason why he should have been denied the normal interview and job discussion.

21. In the result, the Board finds that the respondent has dealt with Iler and Richard contrary to the provisions of section 58(a) of *The Labour Relations Act*.

22. The Board accordingly directs:

- (a) that Iler and Richard be compensated for loss of earnings from the time of termination up to and including the date of the discussion referred to below, at the rate each was earning at the time of termination.
- (a) that Iler and Richard be forthwith afforded a full and reasonable discussion, to be carried on in good faith, of future employment with the respondent at rates to be discussed between the respondent and each of them.

23. If any difficulties arise with respect to the implementation of the Board's direction, they may be referred to the Board, which remains seized of the matter for that purpose.

1028-77-U Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Complainant), v. **Aldershot Contractors Equipment Rental Ltd.**, (Respondent).

Discharge for Union Activity – s. 79 – Whether indefinite layoff motivated by anti-union animus

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members D. Archer and F. Kean.

APPEARANCES: *I.J. Thomson and Don Swait appearing for the complainant; D.L. Brisbin and R. Henderson appearing for the respondent.*

DECISION OF THE BOARD: January 15, 1978

1. This is a complaint filed under section 79 of the Act in which the complainant alleges that the respondent employer violated sections 58 and 61 of The Labour Relations Act when he laid off, indefinitely, on September 26, 1977, the named grievors.

2. The complainant union, which subsequently applied to be and was certified by the Board as bargaining agent for the yard and shop employees of the respondent, held a union meeting on Sunday, September 25, which was attended by approximately fifteen of the respondent's employees. All of those in attendance signed union cards. The following day, the company laid off eight employees three of whom had attended the union meeting and had signed union cards the day before. It was not established that any of the three who had signed union cards and who were laid off on September 26th were active in organizing or otherwise instrumental in securing bargaining rights for the union.

3. The respondent called three witnesses: Mr. R. Henderson, Vice-President and General Manager, Mr. B. Harringham, General Superintendent and Mr. J. Anderson, Sales Manager. It is their evidence that in September of this year the company was suffering the effects of a slowdown in business and a severe cash flow problem which was made worse by

the inclement weather which prevailed during the month of September. It is their evidence that the company had already taken steps to cut its costs in the three month period prior to September 26th but nevertheless continued to be faced by a passing work shortage. It is their evidence that a meeting of the senior officials of the company, originally called for Friday, September 23rd was held on Monday, September 26th for the purpose of dealing with the financial difficulties facing the company. Messrs. Henderson, Harringham, Anderson and Mr. V. Carr, the Secretary-Treasurer and Mr. Archie Galbraith, Workshop Superintendent attended the meeting. Mr. Galbraith did not arrive until the meeting was well underway. Mr. Henderson testified that the meeting commenced at 9:00 a.m. and that a sheet bearing the names of the company's twenty-three hourly rated and sixteen salaried employees was circulated and that by a process of elimination, it was decided to layoff eight hourly rated employees. Mr. Henderson testified that the decision as to who should be laid off was made on the basis of three factors: firstly, classification (the company was prepared to dispense with certain classifications); secondly, wages earned (the company was prepared to get by with the person earning a lower rate); and thirdly, individual productivity. It was the evidence of the company witnesses that the decision with respect to the eight who were laid off was unanimous. Two names were dropped from the list of those who were to be laid off because unanimity could not be reached. The evidence establishes that only three of the eight who were laid off had been to the union meeting on Sunday, September 25th and had signed union cards at the time of the lay-offs.

4. The evidence establishes that the company took a number of other decisions in respect of its operation at the senior management meeting of September 26th. It was decided to park eight of the company's twelve dump trucks. Mr. Robert Zeigler, a mechanic with the company who was unaffected by the lay-off, testified that there has been less work in the shop this fall than in previous years and attributed the decrease in work to the parking of the dump trucks. It was further decided to eliminate the "upper shop", a facility about one mile distant from the company's central shop. One of the employees laid off worked regularly at the upper shop. It was also decided at the meeting of September 26th to cut the hours of certain salaried persons in an effort to reduce expenses.

5. The evidence establishes that the company had responded to its financial problems prior to taking the initiatives agreed upon at the meeting of September 26th. During the months of July and August, seven employees were "eliminated" from the company payroll and were not replaced. The seven were either laid off or terminated for cause. In August, the Company eliminated the five hour per week shift premium paid to those working nights and reduced the day shift hours from 44 to 40 hours per week. In a letter dated August 31st, the company announced that it was discontinuing its 50% premium participation in the medical and dental health plans which were then in effect; arrangements were made to allow the employees to assume the cost of these plans contingent upon 75% participation. The union witnesses testified that it was the proposed cut back in fringe benefits and hours of work which caused the employees to seek collective representation. The evidence also establishes that during this period, Mr. Henderson, the Vice-President and General Manager took a substantial cut in pay.

6. Mr. John Adamson, a body mechanic with five years service with the company, who was laid off on September 26th, testified that just prior to the start of the September 26 management meeting, Mr. Henderson came to him in the shop and said that he had heard rumors that the employees where unhappy and had attended a union meeting. Mr. Adam-

son testified that in reply to Mr. Henderson, he made reference to the cut in hours and the proposed fringe benefit cut. Mr. Zeigler testified that Mr. Henderson approached him at about 8:00 a.m. the same day and asked him how the union meeting had gone, what was discussed and who was there. He testified that he replied saying that everybody was there. Mr. Henderson testified that his first knowledge of the union meeting was shortly before noon on the 26th when he was advised by Mr. Galbraith, the shop superintendent. He denied having met with either employee in the morning of the 26th. He testified that the conversation recounted by Mr. Adamson took place after lunch on the 26th and that the conversation with Mr. Zeigler took place a few days later. He admitted that he may have said hello to Mr. Zeigler on the morning of the 26th.

7. This matter falls within the ambit of section 79(4a) which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in this matter in the *Pop Shoppe (Toronto) Limited* case [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated:

“Section 79(4a) of The Labour Relations Act places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer’s actions were not in any way motivated by anti union sentiment; the employer’s actions must be devoid of “anti union animus.” (See the *Bushnell* case [1944] OR (2d) at page 442). The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct. 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 990).”

The Board, while recognizing that unfair treatment is not a violation of the Act, went on to say in that decision that the Board should not be “unduly swayed by either the co-existence of unfair treatment or by the employer’s conduct in determining if the Labour Relations Act has been violated”.

8. The Board has reviewed the evidence and is satisfied on the balance of probabilities that the action of the company in laying off three of its bargaining unit employees who were supporters of the union was not the result of an anti-union animus and was not, therefore, in violation of the Act. Whereas the timing of the lay-off following immediately upon the union meeting of September 25th, gives rise to a suspicion, the evidence, when considered in its totality, satisfies the Board that anti-union motive did not play a part in the company decision to lay-off.

9. The evidence establishes that none of the union supporters who were laid off played a leadership role in the union’s organizing campaign. The lay-off therefore, cannot

be portrayed as an attempt to remove the leaders of the organizing campaign from the plant. The evidence establishes that the company was experiencing financial difficulties in the summer of 1977 and had taken a number of steps to reverse the situation in July and August, prior to the union's organizing campaign. It was the company decision to reduce hours and cut back its support of the medical and dental plan which precipitated the decision of the employees to seek representations. The Board accepts that the usually heavy rains which occurred in September of this year created additional financial strains which were responded to on September 26th. The lay-off was one of a number of measure taken by the company on that date. The closing of the upper shop and the parking of the dump trucks reduced the company's manpower requirements thereby lending credibility to the decision to lay-off. The lay-off itself was carried out in a manner consistent with the three factors referred to by Mr. Henderson. It was not restricted to union supporters nor was it all inclusive of union supporters. Even if we accept the evidence of the union witnesses and find that Mr. Henderson was aware of the union meeting at the time the decision was taken to lay-off, the evidence, when considered in its totality, does not permit the Board to conclude that the three union supporters were laid off for anti-union reasons. The Board is satisfied that the lay-off was but one of a number of steps taken by the company in response to a pressing financial crisis and that it was not motivated by anti-union considerations.

10. Having regard to the foregoing, this complaint is hereby dismissed.

0857-77-U United Plant Guard Workers of America, Local 1962,
(Complainant), v. **Olympia & York Developments Limited**, (Respondent).

Discharge for Union Activity – s. 79 – Whether discharges motivated by anti-union animus

BEFORE: Rory F. Egan, Alternate Chairman and Board Members W.H. Wightman and O. Hodges.

APPEARANCES: *S. Goudge, Watson Cook and Joseph Bruno for the complainant; Louise Binder, Stephen P. Sibold and J.E. Crumb for the respondent.*

DECISION OF THE BOARD: January 18, 1978

1. The name "Olympia and York Developments Limited" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Olympia & York Developments Limited".
2. This is an application brought under section 79 of The Labour Relations Act.
3. The complainant alleges that Joseph Magnus Bruno was dismissed by Kurt Leyss, Receiving Foreman, and Robert Sharp on or about August 25, 1977, contrary to the provisions of sections 3, 56, 58 and 61 of the Act.
4. The respondent denies that Bruno was discharged contrary to the Act, and

maintains that his employment was terminated because of breaches of his duty as a security guard at the respondent's construction site at 50 King Street West in Toronto. The respondent gave notice that in these proceedings, it would rely upon the provisions of The Construction Safety Act, R.S.O. 1973 c.47 and the Regulations.

5. Bruno had been employed by the respondent since on or about October 30, 1975 and until the incidents under review herein, had received no formal discipline, although he had been spoken to about going outside off the site during his shift. Kurt Leyss, who was senior security officer at the time, said that he has also spoken to Bruno on two occasions and told him not to have visitors on the site. Bruno, on the other hand, said he had never received any complaints, although he stated that Leyss had spoken to him on two occasions prior to the incidents which are said to have led to his discharge. He said in the same context, however, that no one told him the company did not like friends and relatives on the site.

6. There is not doubt upon the evidence that Bruno was discharged upon the insistence of Rober Sharp, the deputy Construction Manager and Executive Vice-President of the respondent. The immediate supervisor of Bruno, at the time of his discharge was Ronald Bond. He was not at work on the days in question.

7. Sharp testified that he was on the site where Bruno was on duty on August 23, 1977. He saw a guard in the area of a security box or shelter which had been set up near the entrance to the site. Sharp said that the guard was in discussion with people in street clothes who were not wearing safety equipment and who were not persons authorized to be on the site. He noted that these people were not wearing hats or shoes of the type required under the Construction Safety Act. He did not discuss the situation with the guard, but did mention it to Bond. Sharp prepared a memo on August 23, 1977 which reads as follows:

It has been brought to my attention that certain O. & Y. site security policies are not presently being followed at FCP.

1. Security post telephones are to be only used in security related business, and all such calls are to be kept as short as possible.
2. The on site parking of unauthorized vehicles is prohibited.
3. Security personnel involved with traffic duties are not to read, or socialize while on duty and are not to leave their posts unattended.

In general I think it has become necessary to immediately review the performance of all construction site security personnel, and ensure that all duties are reviewed and are being performed properly.

Personnel not performing properly are to be notified in writing and if an upgrading in performance is not immediate, then disciplinary [sic] action is to be taken.

8. Copies of the memo were sent to Bond and Leyss, but not to the guards. Sharp also spoke to Leyss, whom he instructed to get in touch with all the staff.

9. Leyss testified that Sharp complained to him late in the afternoon of August 23rd and said he was not satisfied with the situation on the site, and especially the King Street West gate. Leyss said that Sharp did not know the name of the security guard who was on the gate. It was, of course, Bruno. Leyss could not remember all that Sharp complained about, but did recollect that he objected to there being visitors on the site. Leyss went to Bruno and told him he was not to have any visitors on the site and that Sharp had complained about this.

10. As the result of Sharp's complaints and the memo of August 23rd, Leyss, who was Receiving Foreman at this time, prepared a memo of his own addressed to all security officers. He testified that this was outside his normal functions, but he was filling in for Bond who was on his holidays.

11. The memo is dated August 25th and was designed by Leyss to remind all guards of their duties on the gates. Leyss prepared the memo before the 25th, but it bore that date because that was when it was typed. A copy was shown to Sharp as soon as it was typed. It did not affect Sharp's insistence that Bruno had to go. A copy of the memo was given to guards, including Bruno, on August 25th, only a few hours before his dismissal.

12. Leyss was designated to deliver Bruno's separation papers. He told Bruno he was sorry that he was the one who had to tell him and that he was sure Bruno was aware of what had happened the day before and that Sharp wanted him off the site. He told the Board that Bruno remarked that there was no letter explaining his layoff and that the action was intimidation and against the law.

13. It was Leyss' evidence that it was Sharp's decision to discharge Bruno and that he, Leyss, had never had any responsibility to fire people. Leyss had been invited to join the union. He had also discussed the union with Bruno at one time in the middle or latter part of August. He stated that Bruno asked him if he had joined. Leyss said that he knew others had joined and that some had told him they had paid \$2.00. He says he asked why the \$2.00, at which point the conversation ceased. Bruno's evidence was that Leyss asked him if he had joined, to which he, Bruno, responded by asking him why he did not join.

14. Leyss said that he had spoken to Sharp on one occasion about the union. He said it was common knowledge that the union was organizing and that Sharp said there was nothing that could be done about it. He also mentioned the matter to Bond. He said Bond was not happy about it, but also said that nothing could be done about it. Leyss said there was a feeling that "okay, we have to take it". Leyss said that he himself was neutral about the union campaign. He was aware that Bruno was a member of the union but he said it had never occurred to him to tell management who was and who was not a member.

15. Sharp was on the construction site on August 24th where Bruno was again on duty. Sharp's evidence as to what transpired is summarized in the following memo which he addressed to Ron Bond:

Further to my previous memos and discussions with both yourself and Kurt Leyss pertaining to the present standard of site security, particularly at the heavy traffic areas, I would like to point out that I am totally dissatisfied with the situation which presently exists at the 50 King

St. W. gate, where on August 23rd at around 1:00 p.m. I observed the security officer, at this point (J. Bruno), engaged in discussion in his shack with several unauthorized persons, and he was inattentive to the traffic flow in and out of the site.

On August 24th, at approximately 3:15 p.m. I entered the site through the 50 King St. W. gate and found the area totally congested with automobiles, Bank of Montreal deliveries and the excavation contractors vehicles. Non construction personnel were found in the area around the mobile crane and amidst [sic] all of this confusion the security officer was in his shack with the door closed, apparently asleep.

In the interest of safety I, therefore, want this security officer dismissed.

16. Sharp testified that severe disciplinary action was called for because he was of the opinion that the situation was such as to render the company liable under the Construction Safety Act. He was aware that inspectors, under that Act, could close down the site and that that Act provided for fines and imprisonment for violations of its provisions. He said that Bruno's conduct was irresponsible and that it jeopardized the company and endangered the people on the site. Sharp had previously discharged other employees for improper performances of duty – some because of safety and some for other reasons.

17. Sharp stated that he felt that before taking action he should consult Bond to see if there were any extenuating circumstances in Bruno's case. He satisfied himself that there were none and issued the memo.

18. Sharp's evidence is that he became aware of the union's campaign in early August. He said he had not been particularly curious about how many of the guards had joined the union. He had had casual discussions with Bond concerning the union, but that no names were mentioned. He did not know Bruno's name until the day before he was fired. Sharp had had nothing to do with the union's application for certification, which was handled by another department.

19. Bruno said that he had worked on the East gate for 18 months where his job was to tally cars and trucks coming in and going out of the job site. He was under instructions that everyone working on the project must wear hard hats and that he was fully in charge of the yard. He said that during the 18 months, he received no complaints but rather had been told by Leyss that he was doing well.

20. He told the Board that there were instructions issued to permit vehicles which dealt with the Bank of Montreal on the site, and those carrying goods to the cafeteria to come on the site, and these people did not wear hard hats.

21. It was Bruno's evidence that Sharp and Larry Webb, Construction Services Manager, were on the site on August 23rd. He said that when Sharp came on the site, he, Bruno, was standing in front of his shack, his nephew was in the shack, and a messenger from the Bank of Montreal was in the doorway. His evidence is that Sharp questioned him about the cars that were parked on the site but did not mention the people. He said that Sharp was very concerned about the vehicles. He admitted that at the time Sharp left the site later in

the afternoon, there were his nephew, a messenger from the Bank of Montreal and the girl friend of one of the latter, all standing about 5 to 6 feet inside the gate to the site. None of these were wearing safety hats. Sharp did not speak to him but later on Leyss told him that he was to have no friends and no visitors on the site. He said he had never been told that before. Bruno frankly admitted that it was against the rules to allow people on the site without safety hats. He differed with the suggestion that "on site" meant inside the gate.

22. It is clear from Bruno's evidence that on August 23rd Sharp was, in Bruno's words, "very concerned" about the vehicles on the site. Bruno said he was shocked when Sharp told him there were too many vehicles on the site. The evidence also confirms Sharp's testimony that he had observed Bruno in discussion with people in street clothes who were not authorized to be on the site and had spoken to Leyss about informing the guards about this.

23. Bruno's account of what happened on August 24th was that Sharp drove onto the site with a boat attached to his car. Later in the day, as he was sitting in the guard's shack listening to the radio, Sharp "snatched" open the door. Bruno "jumped around" and Sharp told him to come out and help him to get all the vehicles removed. Sharp was trying to get out of the site with his boat and was having difficulty. Bruno said he was not surprised by Sharp's appearance at the shack as he had seen him enter the site. He also denied that he had been sleeping. He said he was leaning over listening to the radio.

24. Bruno explained to the Board that there were seven vehicles and a compressor on the property at the time Sharp was attempting to leave. His evidence was that all the vehicles were authorized, except three. These were Olympia & York trucks that came in and parked without authorization.

25. There is no doubt that there was congestion on the site on the 24th. Sharp said he asked Bruno why the "chaotic state", but got no reply. It is also clear that there were persons standing around the mobile crane who were not wearing protective clothing. The latter situation obviously aroused Sharp's fears of possible penalties under the Construction Safety Act.

26. It is quite apparent that the view of the site from inside the shack was severely limited and that to properly oversee the location, it would be necessary to leave the shack. Notwithstanding this limitation, Bruno insisted that he was told not to leave the shack and that he had a right to stay in the shack, not to be at the gate. He said that he spent 95% of his time within the shack (a structure measuring 2'5" square), although the view of the site from there was severely restricted. He said a memo had been issued on staying in the shack and that he had tried to find out the reason for it but that Bond was "reluctant" to tell him.

27. The evidence is indeed difficult to reconcile with Bruno's earlier testimony that he had been placed fully in charge of the yard. In fact, he also testified that it was his duty to check the site to see if there was room for trucks to come in. He said that in order to do this, he would have to go down to see if a truck had slipped past him. This would obviously necessitate his leaving the shack.

28. When the dimensions of the shack are taken into account, together with the restricted view of the site that it affords and Bruno's acknowledged duties, it would appear

that Bruno was somewhat exaggerating any instructions he had about the use of the shack in an attempt to justify his presence inside it while the situation, which upset Sharp, had developed on the site.

29. Bruno made no claim to having played any part in the organization of the union other than that he signed a card. In this, he was just one of a sufficient number of guards to induce the union to apply for certification.

30. Bruno did, however, say that some time about the 15th of July, Bond had asked some guards if they had joined the union and had told them that they could be given a raise and why form an American union.

31. This evidence was not contradicted by the respondent, which took the position that it was inadmissible, since Bond had had nothing to do with the decision to discharge Bruno and no allegations with respect thereto were contained in the complaint. In any event, the significance of the statement, if any, would have been considerably diluted by the distance in time between when it was said to have been made and the discharge, as well as by the intervening events. Apart from that incident, while there was evidence that the fact of the campaign was widely known among the management people, there was no other evidence offered to show general animosity on the part of management and, in particular, on the part of Sharp, to whom Bruno himself attributed the discharge.

32. One of the factors taken into account by the Board when dealing with complaints alleging anti-union motivation is timing. In that respect, we note that the application for certification was made on August 2, 1977 and a hearing was conducted by the Board on August 15, 1977. The discharge of Bruno thus did not take place until some ten days after the certification hearing. There is nothing in the evidence to indicate directly or inferentially that Bruno played any role in the organizational campaign, other than that he, together with a number of other guards, became a member of the union. Indeed, nothing else is alleged with respect to Bruno's connection with, or activity on behalf of, the applicant union. When the latter is taken into account together with the fact that the campaign was over and done with and a certification hearing had been held well before the discharge, it is difficult to understand what purpose could have been served by Sharp's action, insofar as the union or Bruno's membership therein is concerned, at that late date; and this remains so even if Bruno's evidence of Bond's statement of July 15th were to be accepted as admissible and relevant.

33. In matters such as the present one, the Board is not primarily concerned with the existence or non-existence of just cause for discharge nor with the fairness or lack of fairness in the conduct of the respondent but, rather, its concern is whether the conduct of the employer was in any way tainted by an anti-union motive. That is not to say that where there is evidence of a general anti-union animus, inferences adverse to the respondent may not be drawn where the conduct lacks credibility or appears to be a mere pretext.

34. In the present case, we have taken into consideration, among others, the fact that Bruno did not receive the written warning proposed by Sharp himself in his own memo, but only received the oral message from Leyss concerning unauthorized people on the site. Also, there falls for consideration the fact that Sharp was prepared to consider any mitigating circumstances that Bond might advance.

35. We have carefully assessed all of the evidence and we have no hesitation in finding that Sharp became very concerned about the exposure to liability, corporate and personal, under the Construction Safety Act, and concerning the possibility of damages for injury that the condition of the site indicated to him. This concern was undoubtedly exacerbated by the fact that what he feared were violations of the Safety Act occurred on two successive days when Bruno was in charge of the site and by the fact that he believed Bruno was sleeping in the shack amidst the chaos on the second day. We are also of the view that Sharp was annoyed because of the purely personal problem he encountered in trying to extricate his car with the boat attached, and that his personal pique affected his opinion of and decision regarding Bruno.

36. It is, of course, quite obvious that the respondent was aware of the certification proceedings and, it would seem, showed a not entirely unexpected lack of enthusiasm for the project. Nevertheless, we are satisfied upon the balance of probabilities, after carefully reviewing all of the evidence and keeping in mind the onus under section 79(4a), that the respondent did not act contrary to the Act in discharging Bruno.

37. The complaint is accordingly dismissed.

1503-76-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) Local 636, (Complainant), v. **Truck Engineering Limited**, (Respondent).

S.79 – Collective Agreement – Effect of employer impounding union funds because of allegedly unlawful strike – Whether justified in absence of arbitration award.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members O. Hodges and F.W. Murray.

APPEARANCES: *L.A. MacLean and Noel Stoodley for the complainant; A.P. Tarasuk and R. Harmon for the respondent.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES: January 23, 1978.

1. This is a complaint under Section 79 of The Labour Relations Act in which the complainant alleges that the respondent has violated sections 36a, 37, 38, 42, 56 and 58 of The Labour Relations Act.

2. The complainant and the respondent are parties to a collective agreement covering certain of the respondent's employees at Woodstock, Ontario. The collective agreement contains the following provisions relating to the checking-off of union dues.

“7. (a) The Company will require each new employee upon completion of his probationary period, as a condition of employment, to become a

member of the Union and to authorize the Company to deduct from his first pay each month the regular monthly Union Dues. The moneys so collected will be remitted by the Company to the Financial Secretary of the Union not later than the tenth of the month following deduction.

Upon completion of his probationary period the company will, upon presentation of a signed authorization card, deduct the necessary initiation fee to become a member. The International Union will advise the Company in writing of the amount of the initiation fee as fixed by the International constitution and of any changes thereto as they occur.

(b) Notwithstanding the provisions of the preceding subsections, the Company further agrees that all new employees shall be afforded the privilege of having their dues deducted after the expiration of seven days continuous service by submitting a signed voluntary authorization form to the Company who will thereafter deduct the dues from the first pay each month and remit them to the Union as above.

(c) The Company further agrees in this connection to supply all new employees with a copy of the collective agreement.

(d) The union and the employees agree that in return for such Union Security they must accept the liability for any violation of the no-strike provisions of this Agreement. Accordingly, it is agreed that in the event of any violation of the no-strike clause of this Agreement by the Union and/or the employees, or a group of employees, the Company may at its discretion file with the Union a statement as to the appropriate penalty in the form of a cancellation of dues deduction and/or in the form of loss of seniority or a fine upon the employees. In the event that the parties are unable to agree upon the disposition of the matter, then either party may submit the dispute to a Board of Arbitration and the parties shall be bound by its decision."

3. The employees covered by the collective agreement have authorized the respondent to deduct from their pay each month regular monthly union dues. The amount of regular monthly dues for each employee is equivalent to his pay for two hours' work at straight time. The wording of the authorization form is as follows:

"This will authorize Truck Engineering Limited to deduct from my first pay of each month a sum equivalent to the regular monthly dues only, as assessed by Local 636 of the U.A.W.-C.I.O. and to remit this amount to the local Union Treasurer, in accordance with the terms of the agreement between the Company and the Union.

Date _____ Signature _____"

4. On October 18, 1976, the respondent forwarded to the complainant a letter in the following terms:

"In accordance with Article 7(d) of our current Agreement with Truck Engineering Limited unit of the U.A.W. Local 636, it is our intention to claim damages for losses incurred on October 14th and for succeeding losses incurred as a result of the work stoppage on October 14th.

Damages are estimated to amount to \$26,740.

Dues normally deducted and submitted to the Union Treasury on a monthly basis will be deducted as per usual and held by the Company until the above damage claim has been paid."

5. There is no dispute but that subsequent to the sending of this letter, the respondent continued to deduct amounts equivalent to regular monthly dues from employee wages and that the amounts so deducted were recorded on the statements of earnings and deductions which accompanied employee pay cheques as being for union dues. None of the amounts so deducted, however, were forwarded to the complainant union. Rather, the respondent simply left the money in its union dues account (where it apparently still remains) and each month forwarded to the complainant a list of employees with the notation that those listed had paid their union dues for the month.

6. The respondent justified its action in not forwarding the sums deducted on the basis of certain events alleged to have occurred on and prior to October 14, 1976. Although the Board did not hear evidence as to what occurred in this regard, counsel for the respondent was invited to put forward the facts related to October 14th upon which the respondent intended to reply. For the purpose of these proceedings, the Board accepts these stated facts as being correct. According to counsel, the respondent was approached by the complainant concerning the possibility of permitting employees to participate in the October 14, 1976 "day of protest". The respondent not only refused to accede to this request but it proceeded to notify both the complainant and the employees that it intended to operate as per usual on October 14th and that any strike of employees on that day might interfere with the respondent's production. Notwithstanding these warnings, most, but not all, of the employees in the bargaining unit, with the support and encouragement of the complainant trade union, engaged in a strike on October 14th, in clear violation of the terms of the collective agreement. As the respondent had predicted, the strike did interfere with its production and did result in economic loss to the respondent.

7. As a disciplinary matter the respondent issued letters of reprimand against the employees who had been involved in the strike. The complainant grieved the respondent's action in this regard, but its grievance was subsequently dismissed by a board of arbitration. At no time prior to refusing to forward the dues deductions did the respondent seek an award of damages against the complainant from a board of arbitration so as to compensate the respondent for its financial losses arising out of the strike.

8. Although the complainant alleged that the respondent had violated a number of sections of the Act, it placed its primary emphasis on the alleged violation of section 56. The relevant portion of section 56 provides that no employer "shall participate in or interfere with the formation, selection or administration of a trade union."

9. The result of the respondent's actions is that the complainant has not received

dues from its members that it otherwise would have received. To this extent the respondent has disrupted the administration of the complainant trade union. The mere fact that an employer's actions have adversely affected a union, however, is not a sufficient basis upon which the Board can conclude that there has been a violation of section 56. The Board in interpreting section 56 recognizes that collective bargaining is essentially an adversarial process. Inherent in the process is the risk that one or both of the parties might suffer as a result of a legitimate stand taken by the other side. Goals and objectives, even those most closely held, will not always be attained. Unpalatable demands made by the other side may have to be acceded to. In bitterly contested disputes one of the parties may well suffer serious damage which could impair even its ability to continue to function. Where the adverse affect on either party is of this nature, arising out of a legitimate industrial relations stance adopted by the other side, the Board has been careful to characterize it in terms of "the wear and tear of collective bargaining" and not as constituting the type of interference prohibited by section 56. (See: *A.A.S. Telecommunications Ltd. and Zipcal Ltd.*, [1976] OLRB Rep. Dec. 75 and *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504.)

10. The distinction between a union being incidentally affected by a legitimate position adopted by an employer, and an employer improperly interfering with the internal administration of a union may at times be difficult to determine. The difference between the two can perhaps best be illustrated by way of example. An employer might refuse to accede to a union demand that it provide the union with rent-free office space in the employer's premises. Similarly, if the employer becomes of the view that union stewards are utilizing an excessive amount of time during working hours to investigate employee grievances, an employer might insist on a more restrictive collective agreement provision with respect to the time so spent, even if it may result in the stewards having to perform some of their duties outside of working hours. In both these instances, even though the union might well be detrimentally affected, the conduct of the employer could be justified as a legitimate industrial relations stance. On the other hand, an employer's attempt to dictate the make up of a union's executive or to press for amendments to the union's constitution would constitute a much more direct and serious interference with the union's affairs which would be difficult to justify by reference to any legitimate industrial relations concerns.

11. In this case did the respondent by checking off but then retaining union dues interfere with the administration of the complainant union contrary to section 56? The checking off of union dues is essentially an administrative procedure by which the employer first deducts from the wages otherwise owing to employees amounts equivalent to the union dues owed by the employees to the union and then forwards the funds involved in a lump sum to the union. If a check off system is not employed then the union is required to go through the time and effort of collecting the dues directly. This could be done in a variety of ways including having someone collect union dues at the work place, having members pay their dues at the union office or by having members send in their dues to the union by mail. The process of collecting dues directly from the members is particularly common in the construction industry where although collective agreements generally require that an employer hire only union members, frequently the agreement makes no provision at all for the checking off of union dues.

12. Where a dues check off system is employed, the employer acts essentially as a collector of moneys due and owing from the employees to the union. The employees have earned the full amount of the wages from which the dues are deducted, but on the basis of

the terms of a collective agreement and individually signed authorizations the employer deducts from the wages owing amounts equivalent to the sums owed by the employees to the union. In so doing the employer does not personally become entitled to the money in that he is acting merely as an agent for the collection and transmission of the dues to the union. (See *Re United Steelworkers of America and Brooks Manufacturing Co. Ltd.* (1969), 20 L.A.C. 298 [Weiler].) The employer possesses no authority to do anything with the money so obtained other than to forward it to the union. This point was expressed as follows by an American court when faced with an employer who had checked off union dues from employee wages but had failed to remit them to the union involved. (*Robertson v. Eastern Airlines Inc.* 50 L.C. Para. 19, 380 [N.Y. Sup. Ct. – Dec. 9, 1964]):

“Without challenging defendant’s motives for continuing the check off system subsequent to the June 23, 1962 date, the court discerns no basis in the statute or in precedents to sustain the defendant’s unilateral decision to establish a new check off system, one in which the employer deducts the dues and retains them in escrow, trust or like status in accordance with its rationale. This gratuitous assumption of authority and responsibility by the employer will not be countenanced by the court. The authority of the employer in operating the check off system was for a limited purpose, i.e. to forward such dues to the plaintiff union.”

13. As distinct from the situation where an employer fails to make any dues deductions, in the instant case the respondent continued to check off union dues from employee wages. This is thus not a case where employees could simply turn to an alternative procedure for paying their dues. Having deducted the money in the form of dues payments, the respondent failed to fulfill its responsibility of forwarding the sums to the complainant union in accordance with the terms of the employee authorizations. In doing so we are of the view that it directly interfered with the flow of union dues to the complainant from those of its members employed by the respondent, and that this unilateral action constituted a form of direct interference with the administration of the complainant contrary to section 56 of the Act. What we have here is the unilateral impounding of union dues and not a mere failure to deduct union dues from employee wages.

14. In reaching our conclusion in this regard we have rejected the notion that the respondent’s actions might properly be characterized as a legitimate industrial relations stance which only indirectly affected the complainant. The respondent may well feel that it should be compensated for its losses arising out of the October 14th strike. However, there exists an orderly well-established procedure whereby this could be done without the need to unilaterally interrupt the flow of funds from its employees to the complainant union. Where an employer feels that a union has called or condoned a strike contrary to the terms of a collective agreement, the employer can itself file a grievance against the union seeking compensation for any losses arising out of the strike. (See: *Re Oil, Chemical & Atomic Workers & Polymer Corp. Ltd.* [1959], 10 L.A.C. 51 [Laskin].) If the grievance cannot be settled to the mutual satisfaction of both parties then the employer will have an opportunity to seek to prove both the union’s involvement in the strike and also the amount of damages suffered as a result of the strike. A board of arbitration in such circumstances has the authority, if the evidence so justifies it, to direct the union to pay to the employer a sum equivalent to the losses suffered by the employer as determined by the board of arbitration. If compliance with such a direction should prove to be a problem, then the decision of the board of arbi-

tration could be filed with the Registrar of the Supreme Court of Ontario pursuant to section 37(10) of the Act and thereby become enforceable as an order of that Court.

15. Counsel for the respondent contended that the Board should not find the respondent's actions to have been in violation of the Act in that they were expressly countenanced by article 7(d) of the collective agreement. We are, however, unable to agree with this assessment. Although article 7(d) does provide that under certain conditions the respondent can propose a cancellation of dues deductions, a loss of seniority or a fine upon the employees, the article cannot, as claimed by respondent's counsel, reasonably be interpreted as providing for a right on the part of the respondent to deduct sums from employees' wages in the form of dues deductions and then not to forward the dues so deducted to the union. There exists a real difference between not deducting union dues and the arbitrary impounding of dues once they have been deducted. Further, we are unable to accept the contention of respondent's counsel that the deductions from employee wages can be characterized as a monetary fine against the employees for engaging in the strike. The evidence just does not support such a contention. The respondent's letter of June 18, 1976, states expressly that monthly union dues would be continued to be deducted "and held by the company until the above damage claim has been paid." It was noted to the employees on their statements of earnings and deductions that their union dues had been deducted, which is not the type of notation one would expect if the respondent was seeking to impose a monetary penalty on the employees. Further, the claim that a fine was being levied on the employees does not square with the fact that no dues at all were forwarded to the complainant notwithstanding that not all of the employees had engaged in the October 14th strike.

16. It follows from our conclusion that article 7(d) of the collective agreement does not provide that the respondent can deduct and then impound union dues, as well as from the lack of any evidence to indicate that the complainant otherwise held out to the respondent that it could act in such a manner, that we are unable to accept the contention of counsel for the respondent that the Board should apply the doctrine of estoppel against the complainant. For the equitable doctrine of estoppel to be applied (assuming it can be applied by the Board in a case such as this), there must have been a representation made by one party which it intended a second party to rely upon and which was, in fact, relied upon by that second party to its detriment. (See *Canadian General Electric Co. Ltd.*, [1971] 22 L.A.C. 149 (Johnston.)) In this case such a representation simply did not occur.

17. As an alternative submission, counsel for the respondent contended that the respondent had believed that article 7(d) gave it the authority to do what it did, and thus at most all that was involved was a misinterpretation of a collective agreement. Counsel submitted in this regard that the Board should not find an employer to be in breach of The Labour Relations Act merely because it had misinterpreted a clause in a collective agreement. As a general principle we agree with this proposition. Disputes which center around differing interpretations of the provisions of a collective agreement are generally best left to the grievance-arbitration procedures provided for in the collective agreement itself. However, this does not mean that an employer can misinterpret a collective agreement in such a way as to come into conflict with some substantive provision of the Act and then point to the collective agreement as a shield for his actions. The substantive rights of employers, employees and trade unions as set forth in the Act do not cease to operate upon the signing of a collective agreement. Thus the fact that the respondent may well have felt that it was acting in accordance with the terms of the collective agreement is not a sufficient defence to a violation of the Act.

18. Counsel for the respondent in support of his position also referred the Board to the "Rand Formula" as originally developed in 1946 by the late Mr. Justice Ivan Rand in a rights arbitration award involving the Ford Motor Company and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (see CLLR Vol. 1 Para. 2150). The original formula provided for a compulsory union dues check off from the wage of all employees, although in certain instances this check off could be suspended by the employer. The formula also made employees participating in a strike contrary to the terms of the award liable to a fine of \$3.00 per day. Nowhere, however, did the award provide that an employer could check off union dues and then unilaterally decide not to forward the sums involved to the union. This being the case, we cannot see how the Rand Formula can be of assistance to us in these proceedings.

19. It follows from the above that we are of the view that the respondent by deducting and then impounding union dues without any justifiable reason interfered with the administration of the complainant trade union contrary to section 56 of The Labour Relations Act. Accordingly, we direct the respondent to forward to the financial secretary of the complainant any sums deducted to date, and which may be deducted in the future, from employee wages in the form of dues deductions. It should be noted that this direction is not meant to affect whatever rights the respondent may have to claim damages against the complainant through the grievance-arbitration procedure for its alleged involvement in the strike of employees on October 14, 1976.

DECISION OF BOARD MEMBER F.W. MURRAY

I dissent for reasons to be given at a later time.

0142-77-U Craig Stephen Kreider, (Complainant), v. **FAG Bearings Limited**, (Respondent).

Discharge for Union Activity – S. 79 – Whether conduct on behalf of employee committee is union activity – Appropriate remedy where discharge motivated in part by union activity but reasonable cause for discharge also exists.

BEFORE: M. G. Picher, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *James Fyshe and Alex Freider for the complainant; R.A. Werry, H. Ort and H. Kleinhenz for the respondent.*

DECISION OF THE BOARD: January 26, 1978.

1. On December 2, 1976, Craig Stephen Kreider was fired as a machinist with FAG Bearings Limited ("hereinafter referred to as FAG Bearings") in Stratford. He alleges that his dismissal was motivated by the anti-union sentiment of his employer. The employer maintains that the dismissal was for insubordination on the part of Mr. Kreider and that anti-union sentiment played no part in its decision. Mr. Kreider has filed this complaint un-

der section 79 of The Labour Relations Act claiming that the employer has breached section 58 of the Act and asking the Board to reinstate him in his former employment with full compensation.

5. The complainant's discharge ended a stormy employment relationship. Mr. Kreider began working at the Stratford plant in August of 1975. After a probation period of three months he was moved from his job on a single spindle machine where he had experienced difficulty doing fine work to a less refined Acme multi-spindle machine. He continued to work on a multi-spindle machine until his discharge some 13 months later; the quality of his work and his productivity on that machine were in all respects satisfactory.

3. The Board heard extensive evidence of the involvement of Mr. Kreider in the workings of a plant committee that represented employees. For some five years FAG Bearings has had an employees' committee in its plant. The committee is comprised of representatives elected from each department in the plant and it is headed by an executive committee of four, including a president. The purpose of the committee is to air employee grievances and to communicate with management on all matters of employee relations. To that end the committee meets once a month to discuss current problems. Minutes of its meetings are forwarded to management in the person of plant manager Hans Steigmeier and in the normal course the executive of the employees' committee meet with Mr. Steigmeier one week after the general committee meeting to discuss matters contained in the minutes. The employees in the plant are not represented by a trade union.

4. Approximately two months after he was hired Mr. Kreider became the representative of his department on the employees' committee. And within six months of his hiring he rose to the position of president of the committee. It is clear from the evidence that as president he sought more aggressively than previous presidents to advance the interests of employees as he perceived those interests to be. His tenure as president lasted until his dismissal and was marked by a series of controversies relating both to his role as president and to his role as an employee.

5. The first incident may be described as the vote controversy. Shortly before Mr. Kreider took office, management decided to offer all employees the choice between an additional 2 per cent increment in wages and a continuation of their afternoon coffee-break. Under Mr. Kreider's predecessor president, Ray Jensen, a poll of the employees was taken and it was concluded that they preferred to forego the coffee-break in order to have the extra 2 per cent in wages permissible under A.I.B. guidelines.

6. Mr. Kreider felt that the poll was not a representative sampling and that a vote should be taken among the employees rather than an informal poll. When he took office as president he found that a number of the new executive committee agreed with him. He then approached Mr. Steigmeier requesting that a vote of all employees be held before the 2 per cent increase was implemented. It appears that there were several conversations on that topic between Mr. Kreider and Mr. Steigmeier; in each instance Mr. Steigmeier took the position that the views of the employees had been sufficiently expressed through the poll conducted by the employees' committee and refused to agree to a further vote.

7. After a final heated exchange on that subject between Mr. Kreider and Mr. Steigmeier in Mr. Steigmeier's office, Mr. Kreider decided to take his case to the press. As a re-

sult on March 10, 1976, a local newspaper carried an article entitled "Association Unhappy With Staff Raise Poll". The article described the employees' committee as being unsatisfied with the response of management to the request for a vote. To the extent that the article reflected the comments and views of Mr. Kreider it is fair to say that it cast an unfavourable light on the employer and was the source of some embarrassment.

8. As a result of that article a special meeting of the employees' committee was called by its past president, Mr. Jensen. It is not clear by what constitutional mechanism that meeting was called, but as it was held during working time it could only have been held with the approval of management. It appears that the purpose of the meeting was to impeach Mr. Kreider by a vote of non-confidence because of his recourse to the press without prior consultation with the committee as a whole. In the result, however, Mr. Kreider was confirmed in his position by an overwhelming vote of the committee members.

9. The next day Mr. Kreider presented a written request on behalf of the employees' committee requesting that a vote be taken on the question of the 2 per cent increase. Notwithstanding that written request, on March 17, 1976, the following notice was posted by the managing director of the plant:

TO OUR EMPLOYEES

Re: Recent Wage Increase

It has been brought to our attention that there appears to be some discontent and unhappiness with the recent wage increase. Apparently, some employees do not want to give up the 10 minute break in favour of an additional 2% increase.

If the employees feel they do want to reconsider the matter, management should be informed by Wednesday, March 24, accordingly.

The posting of that notice suggests that management placed little credence in the request for a vote that came from the representatives of the employees by way of Mr. Kreider. Ultimately the company did agree to the taking of the vote, the result of which finally confirmed the outcome of the earlier poll. As Mr. Steigmeier testified, he always believed that Mr. Kreider's stance on the vote was merely a device to get back at management for its refusal to give him a raise. Whatever the validity of that view, it is apparent that in March of 1976 relations were not good between management and the new president of the employees' committee.

10. The second episode giving rise to friction between Mr. Kreider and his employer can be referred to as the attempt at voluntary recognition. From the outset Mr. Kreider was not satisfied with the structure or achievements of the employees' committee and he soon promoted the idea of some formal union status for the committee. In April of 1976, shortly after the conflict over the 2 per cent increase, a sub-committee of the employees' committee was struck to study the possibility of certification under The Labour Relations Act. This was done openly and with the full knowledge of management. In fact, management was approached on at least two occasions. Firstly, in a regular meeting with Mr. Steigmeier the executive of the employees' committee discussed the possibility of co-operation and support

from management in the achievement of some kind of formal union status and a collective agreement. Mr. Steigmeier, on behalf of the employer, declined to give either financial or moral support and advised the employees that if they were to organize they must do so on their own.

11. The second approach to management occurred shortly thereafter. For a period of time employees in Mr. Kreider's department had been declining to work overtime. Mr. Kreider's personal view was that overtime was unfair in that it required employees to work for a period of several hours without an adequate break. One day Mr. Kreider was approached at his machine by Mr. Heinz Kleinhenz who at that time was manager of manufacturing. Mr. Kleinhenz had been told by certain foremen that Mr. Kreider was encouraging employees to refuse overtime. By the manager's own testimony the discussion between himself and Mr. Kreider was heated and loud. Mr. Kleinhenz advised Mr. Kreider that he had no business attempting to influence the employees and Mr. Kreider denied having attempted to do so. There was a vigorous exchange about the need for a break period. At the conclusion of the conversation Mr. Kreider went to his jacket and removed a piece of paper on which he had written what he believed was the proper term for voluntary recognition for the purposes of collective bargaining. He attempted to show the paper to Mr. Kleinhenz by way of asking whether management would be willing to grant voluntary recognition to the employees' committee. Mr. Kleinhenz believed the paper had something to do with certification and refused to look at it or have anything further to do with the subject. That resulted in a further heated exchange and the conversation ended without any resolution of that issue between them.

12. Along with a small group of fellow employees Mr. Kreider continued his efforts to unionize the employees through the following months. On September 26, 1976, he organized a general meeting of all employees at the Stratford City Hall. The purpose of the meeting was to inform the employees of the merits and the mechanics of certification as a union. The meeting consisted mainly of an address to the employees on that subject by an experienced labour lawyer. That meeting was well known to management: Mr. Steigmeier had approved the posting of a notice about it in the plant and Mr. Kreider had publicized it in the plant by wearing a placard. It was also reported in the press. After that meeting Mr. Kreider and the other employees interested in organizing realized that it would be better to work for the certification outside of the plant committee. They then established a separate "outside committee" of six or seven employees which subsequently met only in the homes of employees in the course of November of 1976. At one of those meetings the concerned group established a plan for certification which included drafting of a union constitution and the eventual signing of membership documents by the employees for the purposes of an application before this Board.

13. The evidence establishes that management maintained a particular interest in the activities of Mr. Kreider and his outside committee notwithstanding the knowledge it already had. In this regard we consider the evidence of Bernie Gauler, an employee of 12 years standing at FAG Bearings, to be significant. Mr. Gauler attended a meeting of some seven people at Mr. Kreider's house the purpose of which was to discuss certification. Later he was approached separately in the plant, by Arthur Backmun, a foreman, and by Mr. Kleinhenz, manager of manufacturing. He was asked where the meeting had taken place and he answered that it had been at Mr. Kreider's house. Mr. Kleinhenz asked what the meeting was about and Mr. Gauler replied that it was about information that the outside

committee had received about certification. Mr. Backmun asked Mr. Gauler why he had attended the meeting and was told that it was because Mr. Kreider had information on how to go about certification. The foreman then asked Mr. Gauler what his opinion was about certification and Mr. Gauler gave it. These conversations occurred only a short time prior to Mr. Kreider's dismissal.

14. Two further incidents of friction between Mr. Kreider and management bear mentioning. The first is his record of attendance at work. It is not disputed that he was late or absent on a number of occasions and that his performance in that regard was once the cause of a warning by Mr. Steigmeier. The second incident related to his refusal to work one of his two machines on a given day because he maintained that the coolant in the machine gave off an odour that caused him a headache. His foreman Mr. Cozyn testified that on the day in question fresh coolant had been put into Mr. Kreider's machine and that it could give off an odour. Mr. Kreider was absent from work for the two days following the coolant incident, and the Board accepts his testimony that his absence on those days was due to his attendance and participation in the birth of his child in hospital, and that he called the office at the plant at that time to advise of the reason for his absence.

15. That brings us to the day of his discharge. On the morning of December 2, 1976, an explosion occurred in an open furnace room adjacent to Mr. Kreider's machine. A similar explosion in the plant not long before had resulted in the hospitalization of at least one employee. On this occasion, immediately after the explosion, the furnace attendant could be seen covering his face with his hands. Several employees, including Mr. Kreider, rushed towards the man when foreman Guiesppe Eusebi shouted at them to stop. There was considerable noise in the plant and, not hearing the warning, Mr. Kreider continued into the furnace room. Only when he was satisfied that the furnace attendant was not injured did he turn around and come back out of the furnace room.

16. As he came out he was met by Mr. Eusebi who severely reprimanded him for having placed himself in danger. Agitated by the events, Mr. Kreider told Mr. Eusebi to, "Fuck off!". Mr. Kreider then left Mr. Eusebi and went directly to find Mr. Steigmeier. He found him and as he was speaking to Mr. Steigmeier, Mr. Eusebi appeared. Still in an excited state he then said to Mr. Steigmeier, referring to Eusebi, "Get that guy off my back, or something terrible will happen!". Kreider then walked away in anger, returning to work on his machine. These exchanges between Mr. Kreider, Mr. Eusebi, and Mr. Steigmeier came immediately to the attention of Mr. Kleinhenz. Within an hour Mr. Kleinhenz sent a foreman, Mr. Matthews, to summon Mr. Kreider to his office.

17. At this point it should be noted that on the morning of that same day, before the furnace incident, management had prepared a letter of warning to Mr. Kreider in the following terms:

December 2, 1976

Dear Mr. Kreider:

It has come to my attention that recently you refused to work on your machine because of the smell caused by the coolant. The machine coolant is an important part of the machine, without which it will not run.

No disciplinary action was taken at that time, other than you were informed by your foreman that you were required to carry out your duties as part of your job.

Following this incident you were absent two days. Upon your return you were called to the Plant Manager's office regarding the refusal to work on the machine. You were again informed that you had to do your job. At this point you became abusive toward Mr. Steigmeier. This was overlooked by Mr. Steigmeier in that no disciplinary action was taken except you were informed that no further occurrences would be tolerated.

Also, your attendance record is not very good. You frequently miss days from work and as a result your machine is left idle. You were repeatedly warned about this on more than one occasion and a review of your personal file shows a written warning from 4th November 1976, a copy of which you received. You were absent from work again yesterday morning, and we cannot tolerate it any longer as we cannot operate in this manner.

This letter, therefore, is to advise you that if there are any similar occurrences involving your work, to that outlined above, or if you miss any further time from work, we will have no alternative but to terminate your services.

FAG BEARINGS LIMITED

HELMUT ORT
ASST. GENERAL MANAGER

This letter was never sent to Mr. Kreider, as it was overtaken by the events that occurred on the day it was written.

18. When Mr. Matthews arrived at Mr. Kreider's machine to advise him that Mr. Kleinhenz wanted to see him, Mr. Kreider, still upset, replied that if Mr. Kleinhenz wanted to see him he knew where to find him. When that response was relayed to Mr. Kleinhenz he and Mr. Steigmeier came directly to Mr. Kreider's machine where Mr. Kleinhenz told Mr. Kreider that he was fired forthwith and that he should leave the plant immediately.

19. Mr. Kleinhenz testified that the decision to discharge Mr. Kreider was taken by him when he was told of Mr. Kreider's refusal to come to his office. The issue in these proceedings is whether at that point in time the decision of management was influenced, in whole or in part, by anti-union sentiment aimed at Mr. Kreider.

20. The fact that there may have been cause for discharge is not a complete answer to the allegation in these proceedings. For the purposes of a complaint under section 79 of the Act the question remains whether anti-union sentiment was one of the factors, whatever may have been the priority of factors, in the decision of management to get rid of its employee. Having regard to the burden of proof which is upon the employer, if the Board is

not satisfied that the employer acted entirely without anti-union motive, the Board must find in favour of the complainant. (See, *Regina v. Bushnell Communications Ltd.* (1973) 1 O.R. (2d) 442 (H.Ct.) upheld, (1975) 4 O.R. (2d) 288 (C.A.), *Sheehan v. Upper Lakes Shipping* 77, CLLC ¶14,111 (F.C.A.), *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 294, *Barrie Examiner* [1975] OLRB Rep. Oct. 745, *Fielding Lumber* [1975] OLRB Rep. Sept. 665). Anti-union motivation is seldom admitted by an employer, and in a case such as this the Board must make the inferences which to it appear most probable having regard to all of the circumstances surrounding the discharge.

21. There appear to be several reasons why management would have wanted to see Mr. Kreider out of the plant. It is obvious that as president of the employees' committee Mr. Kreider was a constant thorn in the side of management generally, and of Mr. Steigmeier in particular. It should be stressed that the activities of Mr. Kreider on behalf of the employees' committee are not protected by The Labour Relations Act, at least to the extent that they do not involve any attempt to organize a union. Any discharge because of that activity would not be a breach of the Act. The 2 per cent wage controversy, the contentious press release and the attempted impeachment of Mr. Kreider are not evidence of anti-union *animus* directed at Mr. Kreider, but serve rather as important background to the overall relationship between himself and his employer. It is clear from that evidence and from the testimony of Mr. Steigmeier and Mr. Kleinhenz that management came to view Mr. Kreider as a headstrong individual with what management perceived as a troublesome penchant for leading the employees in his own direction.

22. Management might also have wished to discharge Mr. Kreider on the basis of his attendance record, although the evidence would indicate that he had only three unexcused absences from work in all of 1976, albeit he was absent due to sickness for a further 20 days. It is also clear that his insubordination to both Mr. Eusebi and Mr. Kleinhenz on December 2, 1976, could be an obvious cause for discipline or discharge.

23. And then there is Mr. Kreider's union activity, including his efforts within the plant employees' committee and ultimately, in the "outside committee". We note that in all of their conversations with Mr. Kreider, Mr. Steigmeier and Mr. Kleinhenz refused to discuss any attempt to unionize the plant employees, whether by certification or voluntary recognition. They consistently professed to have no interest in whether a union should be brought in, and that was the view they described in their evidence before this Board. The unchallenged evidence of Mr. Gauler, however, suggests otherwise. While management would not discuss the union with Kreider and professed no interest, two of its members, one of whom was the man who decided to fire Mr. Kreider, approached Mr. Gauler in an attempt to find out what was happening at a union organizing meeting in Mr. Kreider's home. That was only a few weeks prior to his dismissal.

24. Considering both the way in which management viewed Mr. Kreider as a leader of the employees and the way in which it sought to scrutinize his attempts to organize a union so shortly before his discharge, we are satisfied, on the balance of probabilities, that anti-union sentiment did play a part in the decision to terminate Mr. Kreider. According to the evidence of foremen Cozyn and Eusebi, Mr. Kreider had been a good worker and had never been insubordinate prior to the day he was discharged. Against that background and in light of Mr. Kreider's actions in the furnace incident, the swiftness and harshness of his discharge on December 2, 1976 supports the inference that management seized the opportu-

nity to terminate Mr. Kreider's employment for reasons beyond the events of that day, including its obvious concern for his role in leading the attempt to organize the employees under The Labour Relations Act. We therefore find that Mr. Kreider's discharge was motivated by anti-union sentiment and is in breach of section 58(a) of The Labour Relations Act.

25. The respondent shall, therefore, reinstate Mr. Kreider forthwith in his former employment.

26. He should not, however, be reinstated with full compensation. The remedial authority of the Board in section 79 of the Act is designed to place the employee, in so far as possible, in the position that he would have been in absent any breach of the Act by his employer. (cf. *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299). The evidence indicates that the employer has a practice of imposing disciplinary suspensions on its employees. We are satisfied that Mr. Kreider would have been subject to a suspension as a result of his conduct on the day of the furnace incident. Account must also be taken of the pattern of absenteeism in his record. It appears that following his normal course of attendance he would have been without wages for some thirty working days in the course of a year. The quantum of compensation must also be mitigated by the amount of income which the complainant received from other sources during the period of his discharge.

27. The matter of compensation is therefore remitted to the parties for the purpose of reaching an agreement taking these and any other relevant factors, such as lay-offs, into account. The Board shall remain seized of this matter in the event that the parties are unable to reach an agreement with respect to compensation.

1050-77-M L. Harmel, E. Geitmann and International Union of Elevator Constructors, Local 90, (Applicant), v. **Montgomery Elevator Company Limited** and National Elevator and Escalator Association (formerly Canadian Elevator Manufacturers Association), (Respondents).

Practice/Procedure - Arbitration s.112a - Whether Board will adjourn proceedings at request of applicant union.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *Stanley Simpson for the applicant; Janice A. Baker and Hugh Richards for the respondent.*

DECISION OF THE BOARD: January 20, 1978.

1. This is an application under section 112a of The Labour Relations Act.

2. The Board determined, preliminarily to hearing of the application, that neither the National Elevator and Escalator Association nor its predecessor, Canadian Elevator

Manufacturers Association, were parties to the collective agreement with the applicant, and that the application naming those Associations as respondents was dismissed insofar as those Associations were concerned.

3. This matter originally came on for hearing on October 18, 1977. The applicant's chief witness was taken ill during the luncheon recess and before completion of his evidence in chief. The hearing was adjourned by the Board, and the Registrar subsequently, in consultation with the parties, set the application down for continuation of the hearing on December 21, 1977. Notice of Continuation of Hearing was dated October 31st and on November 3rd counsel for the applicant verbally informed the Registrar that he would be unable to proceed on December 21st due to the unavailability on that day of his chief witness.

4. The reason for the witness' projected unavailability on December 21st was a prior arrangement made by him to visit with his elderly parents in Florida during the period December 2nd to December 23rd. Counsel was not aware of this prior arrangement at the time the Registrar fixed the date of December 21st.

5. Counsel for the applicant, after unsuccessfully endeavouring to contact counsel for the respondent by telephone, on November 17th communicated by letter with the respondent's counsel and outlined the problem. Respondent's counsel replied by letter on November 23rd refusing to consent to an adjournment of the hearing scheduled for December 21st. On November 24th the applicant notified the Registrar of the discussions between counsel and requested that the Board exercise its authority to fix a date for continuation other than December 21st. A hearing was directed to be held on December 12, 1977, the purpose of which was to permit the applicant to show cause as to why adjournment of hearing for December 21st should be granted.

6. The "show cause" hearing was held by a different Board panel than the present panel. An oral decision was issued refusing to depart from usual Board policy of not granting an adjournment except with the consent of both parties.

7. On December 14th, the applicant notified the Registrar of his lack of instructions to proceed without his chief witness and that an appearance would be made at the hearing of December 21st and the request for adjournment would then be reviewed.

8. At the hearing on December 21st, counsel for the applicant took the position that the Board panel, which dealt with the request for adjournment on December 12, 1977, was without jurisdiction inasmuch as the present panel was already seized of the issue, and that, therefore, the applicant was now coming to the Board for the first time. Counsel further argued that in the event the other Board panel was wrong in applying the Board's usual standards in respect to the granting of adjournments and that the Board should more properly, in applications under section 112a, follow the practice of other arbitration boards, which was stated to be somewhat more liberal in this regard.

9. In our view, the request for adjournment, heard by another Board panel on December 12, 1977, cannot be considered as the issue with which the present panel was already seized but rather an indirect issue, arising out of the Registrar's exercise of authority to fix the date of hearing, which can be tried separate and apart from the substantive issues.

Such being our view, it follows that the present panel cannot presume to deal with an issue heard and decided by another panel of the Board.

10. At the hearing on December 21st, counsel for the applicant was given the opportunity of making full representations, and even if our view, as expressed in the immediately preceding paragraph, were different, we would not have come to any different conclusion in respect to the request for adjournment. We note that the applicant was aware on November 23rd of the lack of agreement on an adjournment and that it would have still been open to the witness to either change his scheduled visit dates or alternatively to have made arrangements to interrupt his visit by one day. Exercise of this latter alternative, in today's transportation availabilities, cannot be considered an unusual one. The language and reasoning of the board in *Patrick Hann v. Service Employees Union, Local 204 A.F.L.-C.I.O.-C.C.C. v. Baycrest Centre of Geriatric Care*, [1976] OLRB Rep. Aug. 432 at page 433, is applicable to the present circumstances in which the Board said,

"The Board policy with respect to adjournments has been capsulized in the *Nick Misney* case [1968] O.L.R.B. Rep. 823 (upheld in the Ontario Court of Appeal, 70 CLLC 14,024) wherein the Board stated:

'... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness ...'

The Board has held, in refusing to grant adjournments, that it is the responsibility of the complainant to do whatever is required to ensure that witnesses essential to its case are present at the hearing (see *Weston Bakeries* decision [1971] O.L.R.B. Rep. Jan. 30). The Board has further held that it is incumbent upon a party to properly prepare itself for a hearing which includes the obtaining and serving of the required summons (see: *Agilis Corporation Limited* decision [1971] O.L.R.B. Rep. Feb. 98). In the matter at hand counsel for the complainant chose not to serve summons on two witnesses whom he described as 'crucial' to his case. He chose not to serve the two persons because he did not wish to interfere with their holidays. He argued that to have served them in the face of their holiday commitments would have been a 'charade'.

The purpose of a summons is to compel the attendance of witnesses at a hearing and as such it is an instrument which enables this Board to conduct its hearings at the appointed time and place and, more importantly, it is an instrument which provides a party with access to those witnesses who are essential to the presentation of its case. It is incumbent upon a party seeking the attendance of a witness(es) to avail itself of this instrument. Counsel can not [sic] decide against serving a potential witness, who had indicated that he will not attend, and then, in the

face of the person's non-attendance, request an adjournment. If the Board (or any court for that matter) were to accede to such a request it would be inviting manipulation of its procedure causing undue delay and consequent prejudice to parties appearing before it. The Board, therefore, restates that in the circumstance of this case it has no alternative but to deny the request for an adjournment."

11. It is not necessary for us, in disposing of this proceeding, to deal with the applicant's argument that matters under section 112a of the Act should be dealt with in such a manner as applied by other boards of arbitration in order that there be a common "arbitration jurisprudence". We are convinced that in hearing an arbitration in a forum other than that provided by section 11a this matter would have been dealt with differently. Be that as it may, it is clear, from a reading of The Labour Relations Act, that the Board's practices and procedures are imported into section 112a proceedings.

12. At the hearing, counsel for the applicant made it clear that the only purpose of appearing was to deal with the request for adjournment and that he was unable to proceed further with presentation of the applicant's case, and, indeed, that he had come to the hearing with the intention of dealing only with the adjournment issue and had made alternative commitments rendering himself unavailable to participate further in the proceedings.

13. Accordingly, the application is dismissed.

14. Counsel for the respondent made a further submission on December 21, 1977 that the applicant's conduct was frivolous and vexatious and that the Board should exercise its plenary powers under section 112a to award costs against the applicant in respect to the Show Cause Hearing of December 12th. We do not think this is a case in which the Board should depart from its normal policy of not awarding costs.

0490-77-R The Retail Clerks International Association, (Applicant), v. Diamond "Z" Association, (Predecessor Trade Union), v. **Zehrs Markets Division of Zehrmart Limited**, (Employer).

Successor Status – Effect of holding union meeting on Sunday – Whether merger defective.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *Alick Ryder for the applicant; W. Gibson Gray and Vern Barnett for the employer; no one appearing for the predecessor trade union.*

DECISION OF THE BOARD: January 10, 1978.

1. This is an application under section 54 of The Labour Relations Act wherein the applicant is seeking a declaration that it has acquired the rights, privileges and duties of the Diamond "Z" Association.

2. Following a first hearing in this matter the Board on October 12, 1977 issued a decision wherein it dealt with a number of the issues relevant to the application. Subsequently a second hearing was held with respect to the issue of whether or not the members of the Diamond "Z" Association had received proper notice of the special meeting of the Association held on Sunday, June 12, 1977, at which a proposed merger, amalgamation or transfer of jurisdiction to the applicant had been discussed and voted on.

3. The evidence before the Board establishes that a notice concerning the meeting of June 12th was posted on notice boards in the employer's warehouse in Kitchener and also at the employer's seven stores where The Diamond "Z" Association held bargaining rights. With respect to the warehouse and six of the stores the notice was posted on Wednesday, June 8th. With respect to the seventh store, located at Grange and Victoria Streets in Guelph, it is clear that the notice was posted at the very latest on the morning of Thursday, June 9th. The form of the notice is set out in full in the board's decision of October 12, 1977.

4. Prior to June 12, 1977 the constitution of the Diamond "Z" Association did not contain any notice requirements with respect to special meetings such as that held on June 12th. Article 4 of the constitution did, however, set forth the following notice requirements with respect to general meetings:

"A general meeting of the Association shall be held during the month of January or February in each year and at least three days notice of such meeting shall be given to all members of the Association. Such notice may be given by posting same on the bulletin board in all the stores and warehouses".

If we were to assume by analogy that these notice requirements also applied to the calling of special meetings, we are satisfied, having regard to the timing and locale of the postings referred to above, that these requirements were in fact met with respect to the meeting of June 12, 1977.

5. At the meeting of June 12th, prior to actually dealing with the proposed merger, amalgamation or transfer of jurisdiction to the applicant, the members present voted to amend the constitution of The Diamond "Z" Association to allow for such a merger, amalgamation or transfer of jurisdiction. The constitution was also amended to provide that notice of any meeting at which a vote on the question of a proposed merger, amalgamation or transfer of jurisdiction was to be taken must be given "by posting the same on the bulletin board of all stores and warehouses, where the Association is the bargaining agent". Having regard to the evidence before us we are satisfied that this notice requirement was also met.

6. It follows from our conclusions as set out above that we are satisfied that all of the requirements under the Diamond "Z" Association's constitution relating to the giving of notice of the meeting on June 12th were complied with. Further, having regard to the fact that the constitution of the Association provides for a 3-day posting of notices in the employer's premises with respect to Association meetings, and having regard to the fact the evidence establishes that this has been the regular method employed to inform members of Association meetings, the Board is satisfied that the manner in which notice of the meeting was given constituted "reasonable notice" in the circumstances and that any common law requirements of reasonable notice which might apply separate and apart from the require-

ments in the Association's constitution were met with respect to the meeting of June 12, 1977.

7. At the second hearing before the Board counsel for the employer contended that both the membership meeting of The Diamond "Z" Association held on Sunday, June 12, 1977, and the notice informing the members of the meeting, had been improper and of no effect due to the provisions of sections 4 and 8(1) of The Lord's Day Act (Canada). These sections provide as follows:

4. It is not lawful for any person on the Lord's Day except as provided herein, or in any provincial Act or law in force on or after the 1st day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do on that day, any work, business or labour.

8(1). It is not lawful for any person to advertise in any manner whatever any performance or other thing prohibited by this Act.

As we understand counsel's submissions in this regard, he is of the view that the Association and its members on June 12, 1977 violated that part of section 4 which prohibits a person on the Lord's Day from carrying on or transacting "any business of his ordinary calling or in connection with such calling".

8. In dealing with counsel's submissions in this regard, we propose to deal firstly with the question as to whether or not The Diamond "Z" Association violated the Lord's Day Act on June 12, 1977, and secondly with the question of whether or not members of the Association might have violated the Act.

9. With respect to the Association, we note that nowhere in the definition of "persons" in the Lord's Day Act (which incorporates the meaning of the term in The Criminal Code) is there to be found a reference to a trade union. Further, there is strong legal authority in this Province to the effect that a trade union does not, apart from The Labour Relations Act and related legislation, even possess the status of a separate entity at law. In this regard we refer to the following statement of Evans, J.A. (concurring in by Kelley J.A.), in *Astgen et al v. Smith et al* (1969) 7 D.L.R. (3d) 657 (Ont. C.A.) at p. 661:

"Prior to dealing with the merger agreement I consider it desirable to determine the precise legal status of a trade union or labour union, the relationships existing among the membership inter se and the relationships of each member to the totality of the persons associated together. I concede at the outset that a labour union under the Labour Relations Act, R.S.O. 1960, c. 202, and allied legislation has a "status" conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain

objects and whose conduct in relation to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

The proposition that a trade union has a special status, that it is a sort of hybrid corporation, has no foundation in law. This misconception is fostered by the "legal entity" character which labour legislation has thrust upon trade unions but is not legally supportable outside the purview of those statutes. While trade unions have historically strenuously opposed and rejected any movement toward corporate status with its attendant strictures, there has evolved a concept, which has no basis in law, that unions have a quasi-legal entity; that they have a peculiar status which clothes them with the advantages of corporations but shields them from the restrictions and liabilities attaching to corporate entities. This misunderstanding, and it is a fundamental one, must not be allowed to becloud the issues herein."

10. Counsel for the employer contended that a union in Ontario does have the status of a person and in support of this proposition he referred the Board to the recent decision of the Ontario High Court in *Seafarers International Union of Canada et al v. Lawrence* (1977) 15 O.R. (2d) 226. In that case the Court concluded that an action based on defamation of a union could be brought by two or more officers of the union on their own behalf and on behalf of the union. In reaching this conclusion the Court made the statement that while a trade union is unable to sue or be sued in its own name, nevertheless "it is now well established that a trade union in Ontario is an entity recognized at law".

11. Having regard to the decision of the Court of Appeal in *Astgen v. Smith*, we are not prepared to interpret the decision in the *Seafarers* case as going so far as to indicate that a trade union outside the purview of the various labour relations statutes is a legal entity similar to a corporation and thus capable of violating laws of general applicability. Further relying on the *Astgen v. Smith* case, we are of the view that The Diamond "Z" Association is not a "person" as that term is used in section 4 of the Lord's Day Act and thus cannot be said to have been in violation of that section.

12. If we are in error in this regard, and if it is the case that a trade union is a "person" within the meaning of the Lord's Day Act, we nevertheless are satisfied that The Diamond "Z" Association engage in no activities contrary to section 4 of the Act on June 12, 1977. The relevant portion of section 4 prohibits the carrying on of "any business". The term "business" as it is used in section 4 of the Act was discussed in the following terms by the Manitoba Court of Queen's Bench in the case of *Re Warner and Manitoba Labour Board* (1960) 25 D.L.R. (2d) 217 at p. 221:

"Business" has been frequently said by the Courts to be a word of large and indefinite import. However, it must be construed as used in s. 4 where it appears in conjunction with the words "of his ordinary calling". That being so I cannot do better than adopt the language of Osler, J.A., in *Rideau Club v. Ottawa* (1907), 15 O.L.R. 118 where he said (p. 122):

“Business” is a word of large and indefinite import, but (as used in the section) its evident and reasonable meaning is (to adopt the language of the Master of the Rolls in *Smith v. Anderson* (1879), 15 Ch.D 247, at p. 258) something which is followed and which occupies time and attention and labour for profit’.

In the instant case, it appears that nothing which occurred at the meeting of June 12th was done so as to profit The Diamond “Z” Association. This being so, we are of the view that it cannot be said that the Association was carrying on any business within the meaning of the section.

13. Counsel for the employer placed his primary emphasis on the contention that the members of The Diamond “Z” Association by participating in the meeting of June 12th had as individuals engaged in conduct prohibited by section 4 of the Lord’s Day Act. Returning to the relevant part of that section again we note that the prohibition is against a person carrying on or transacting “any business of his ordinary calling, or in connection with such calling”. The meaning to be given to the word “business” has been set out above in the Warner case. The meaning to be given to the term “calling” in section 4 was dealt with by the Ontario High Court in *Magee v. Channel Seventynine Ltd.* (1976) 15 O.R. (2d) in the following terms (at p. 194):

It is necessary to look at the wording of s. 4 as it is now constituted in order to ascertain its meaning. The language used therein is simple. The only word which might lead to some difficulty in interpretation is the word “calling”.

In Murray’s English Dictionary (1893 edition), “calling” is defined as: “Ordinary occupation, means by which livelihood is earned, business, trade; a body of persons following a particular profession or trade.”

In the Shorter Oxford English Dictionary, 3rd ed., “calling” is defined as: “Ordinary occupation, business.” There is no reason to apply anything other than the ordinary dictionary meaning of “calling” for the purpose of interpreting s. 4.

14. Putting together the meaning to be given to the words “business” and “calling” in section 4 of the Lord’s Day Act, it would appear that the relevant part of the section goes no farther than to prohibit the engaging in of activities related to one’s occupation for profit on a Sunday. The individuals who attended at the meeting on June 12, 1977, however, were not engaged in any activity related to their occupation or calling, but instead were engaged in activities related to their membership in The Diamond “Z” Association. Further, while the individuals involved may well have been acting with the intention of seeking some possible benefit for themselves, it cannot reasonably be said that they were engaged in carrying on business for a profit. This being the case we are of the view that the individual members of The Diamond “Z” Association who attended at the meeting of June 12, 1977 did not act in contravention of section 4 of the Lord’s Day Act.

15. It follows from the above that we are of the opinion that the meeting of June 12, 1977 was not prohibited by section 4 of the Lord’s Day Act and thus, as a corollary, neither was the notice of the meeting prohibited by section 8 of that Act.

16. Having regard to the conclusions as set out in the decision of the Board dated October 12, 1977, and having regard to our findings as set out above with respect to the notice given to the members of The Diamond "Z" Association concerning the meeting of June 12, 1977, we are satisfied that at that meeting the Association did merge, amalgamate or transfer its jurisdiction to the applicant union.

17. Accordingly, the Board declares, pursuant to section 54(1) of The Labour Relations Act, that The Retail Clerks International Association, by reason of a merger, amalgamation or transfer of jurisdiction has acquired the rights, privileges and duties of The Diamond "Z" Association, which was the bargaining agent for certain employees of Zehrs Markets Division of Zehrmart Limited.

1135-77-R Ontario Haulers Union, (Applicant), v. **Repac Construction & Materials Limited**, (Respondent), v. A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183, (Intervener #1), v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230, (Intervener #2), v. Labourers' International Union of North America, Local 183, (Intervener #3), v. The Metropolitan Toronto Road Builders' Association, (Intervener #4).

Certification – Trade union status – Effect of previous applications – Whether bar appropriate.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members C.G. Bourne and P.J. O'Keeffe.

APPEARANCES: *J. McNamee and A. Natale for the applicant; S.C. Bernardo, Len Racioppa and Mike Halliday for the respondent and intervener #4; S.B.D. Wahl, B. Teichmann and C. Lacombe for interveners #1, 2 and 3.*

DECISION OF THE BOARD: January 11, 1978.

1. This is an application for certification. The applicant has not yet established its status as a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

2. At the hearing counsel for all parties other than the applicant submitted that the Board should exercise its discretion under section 92(2)(i) of the Act and refuse to entertain this application. Section 92(2)(i) empowers the Board to either bar an unsuccessful applicant, or to refuse to entertain a new application by an unsuccessful applicant, for a period not exceeding ten months from the date of the dismissal of the unsuccessful application.

3. The submission that the Board should refuse to entertain this application is based on two previous applications for certification involving the same respondent as in these pro-

ceedings. The first application (See: *Repac Construction & Materials Limited* [1976] OLRB Rep. Oct. 610) was filed by "Ontario Haulers Association Inc." At the hearing held with respect to that application the applicant was called upon to satisfy the Board of its status as a trade union. Part way through the hearing counsel for the applicant requested leave of the Board to withdraw the application. The Board, however, denied the request and dismissed the application. The events which prompted the attempt to withdraw the application are set out in the following excerpts from the Board's decision in that case:

"4. For the applicant, Mr. A. Natale, its president, gave evidence relating to the formation and evolution of the applicant organization. During the course of examination-in-chief, the Board's attention was drawn to the fact that Natale was referring to a certain document while giving his testimony. The witness's explanation of this document left the Board with the firm impression that the document consisted of all the minutes of the applicant's meetings, and that these minutes had been written out at the meetings by the witness. Given the relevance of this document to the issue of the applicant's status, the Board ordered that this document be admitted into evidence as an exhibit.

5. At the close of examination-in-chief of Natale, counsel for the intervenor trade union requested the Board to permit an examination of this exhibit by Mr. Royston Packard, a forensic examiner. The Board adjourned to consider this request. Immediately after the hearing was reconvened, counsel for the applicant made a statement to the Board. The gist of the statement was that the document purporting to be the minutes of the meeting had been written out by Natale just a few days prior to the hearing, being prepared from minutes made by Natale and another person at the time that the meetings were held. Counsel for the applicant stated that there had been no intention to mislead the Board, apologized to the Board, and sought leave to withdraw the applications."

4. The above referred to application was dismissed on October 8, 1976. On June 16, 1977, a second application was filed (See File No. 0462-77-R) this time in the name of "Ontario Haulers Union", the same name as employed by the applicant in the instant proceedings. With respect to this second application, Mr. Natale again gave evidence as to the status of the applicant. Certain excerpts from the Board's decision in that case, dated September 22, 1977, follow:

"2. Mr. A. Natale, the president and founder of the applicant, gave evidence relating to the formation of the applicant organization. During the course of his examination-in-chief, Mr. Natale produced a document which he testified contained the minutes of the meeting at which the applicant had been formed. Mr. Natale's evidence-in-chief was that the minutes of the founding meeting had been drawn up by himself and, further, that they had been drawn up at the meeting.

3. The document in question displays at least two different kinds of ink and, to the untrained eye of the Board, appeared as well to have been

written by more than one person. When questioned about this by the respondent, Mr. Natale stated categorically that every word in the document had been written by himself and that no one else had been involved in the physical preparation of the document. His explanation for the discrepancy in ink was that he had taken the document with him to the meeting with a number of entries already written in. These entries are in the nature of procedural announcements and directives and were stated by Mr. Natale to have been made by himself the day before the meeting after consultation with a lawyer as to the procedure to be followed when forming a trade union. The Board was informed that the remaining entries on the document reflected what actually took place at the meeting by Mr. Natale alone.

5. Mr. Natale told the Board that there were, in addition to himself, seven employees present at the meeting at which the applicant was founded. Mr. Natale, however, was the only witness called by the applicant to give evidence as to what took place at that hearing.

6. Not being satisfied with the witness's explanation of the preparation of the purported minutes of meeting, counsel for the respondent called Mr. Royston Packard, a forensic examiner, to give evidence before the Board. Mr. Packard, an individual whose qualifications as an expert in the field of hand-writing that three different writing instruments had been used in the preparation of the document in question. He testified further that while it was possible that the document had been prepared by one person, the primary indication from the document was that it had been produced by two or more different hands.

9. The grant of trade union status to an applicant entitles it to negotiate and enter into collective agreements, and to otherwise exercise the powers granted to it under The Labour Relations Act. As indicated at the outset, the onus rests upon the applicant to prove its status if such status has not previously been established before the Board. In order to establish its status as a trade union, an applicant must satisfy the Board that it is a viable entity for collective bargaining purposes; and, in this regard, the Board requires that *vive voce* evidence be given of the circumstances surrounding the formation of the union. Needless to say, the Board must be satisfied that the applicant's account of those circumstances is a true one.

10. The Board, having regard to the *prima facie* appearance of the document alleged to contain the minutes of the applicant's founding meeting, to the expert evidence of Mr. Packard, to the fact that Mr. Natale was the only witness called to give evidence for the applicant, and to the demeanour of the witness on the stand as well as his evidence as a whole, is not satisfied that Mr. Natale's account of the circumstances surrounding the formation of the applicant can be given credence. Accordingly, we are unable to conclude that the organization which Mr. Natale claims to have founded is a trade union within the meaning of The Labour Relations Act.

11. This application for certification is, therefore, dismissed.”

5. In the instant proceedings counsel for the applicant stated that he would not deny that the two above referred to applications as well as the instant application had been made “by the same group of people”. Mr. Natale appeared at the hearing in these proceedings as one of the representatives of the applicant.

6. Counsel for the parties other than the applicant contended that the facts surrounding the earlier applications were so extreme that they called for a refusal on the part of the Board to entertain this application. Counsel for interveners # 1, 2 and 3 also submitted that the need to prevent abuses of the Board’s processes called for a refusal to entertain the application.

7. As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.* [1976] OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶18,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2) (i) in other situations. The leading example of this is the *J. W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where “in light of the special and extreme circumstances confronting the Board”, namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2) (i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See: *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).

8. The instant proceedings to date do not involve the taking or directing of a representation vote. Further, we are of the view that the mere fact that the same individuals, and perhaps even the same organization, have been involved in two previous applications for certification is not such a “special and extreme” circumstance as would cause the Board to refuse to consider this application. This, then, brings us to a consideration of the reasons behind the dismissals of the earlier applications as well as to the concern expressed about the need for the Board to prevent abuses of its processes. We do not, of course, condone any abuses of the Board’s processes which may have occurred in the earlier proceedings, and we concur in the statements contained in the earlier Board decisions with respect to the requirement that witnesses give their testimony before the Board accurately and fully. However, we are of the view that to refuse to consider the instant application would amount, in the circumstances, to a punitive measure. In respect of this issue we would adopt the following excerpt from the decision of the Board concerning the first application, where in refusing a request that it bar the applicant from any future applications the Board made the following statement:

“Our dismissal of the (application) raises the question of whether we would exercise our discretion by imposing a bar. The Board has never

regarded this power as being punitive in nature. See *General Freezer Ltd.* [1963] 63 CLLC ¶16,294. In this case, it is suggested that the bar be used as a measure to control what might be regarded as an abuse of process occurring during the hearing. To impose the bar at this point in the proceedings, prior to any determination of the true wishes of the employees, would certainly delay, and perhaps defeat, the representation of employees by the bargaining agent of their choice. In these circumstances, the imposition of a bar could only be regarded as punitive. In our opinion, therefore, a bar should not be imposed in this case.”

9. Having regard to the foregoing, we are of the view that the Board should not refuse to entertain the instant application. We would stress, however, that our decision in this regard goes no further than a conclusion that the instant application should be considered by the Board. We make no finding as to what effect, if any, the previous proceeding might have on the instant case, nor as to whether the decision of the Board in File No. 0462-77-R effectively disposed of the issue of the applicant's status as a trade union.

10. The Registrar is directed to relist this matter for hearing. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application, including the question of the applicant's status as a trade union.

**0810-77-R United Rubber, Cork, Linoleum & Plastic Workers of America
AFL-CIO-CLC, (Applicant), v. Pal -O- Pak Manufacturing Company
Limited, (Respondent).**

Certification – Employee – Whether watchman is a guard.

BEFORE: M. G. Picher, Vice-Chairman and Board members O. Hodges and F. W. Murray.

DECISION OF THE BOARD: January 12, 1978

1. By order dated September 7, 1977 the Board granted interim certification in respect of the bargaining unit in the instant application. the only outstanding issue at this time is the employment status of Albert Knapp. The respondent submits that he is security guard within the meaning of section 11 of the Act and should therefore be excluded from the bargaining unit.

2. Section 11 provides:

11. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organi-

zation shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

3. The report of the examiner discloses that the duties of Mr. Knapp include custodial responsibilities, some loading work and the functions of a watchman. He regularly works a shift alone in the respondent's plant from 8 p.m. to 8 a.m. on Saturday and Sunday nights as well as working occasionally during the week when called upon.

4. In his own words his duties include unloading trucks, cleaning flowerbeds, sweeping floors, mending odd bags and checking the locks on some ten doors to the plant. He checks the doors roughly every hour; he is not entrusted with keys to the doors, but merely locks them by pulling them shut if they are not properly closed. He keeps a lookout for fires and for prowlers, and would report any trespassers to his supervisors or to the police.

5. Numbers of employees may have as some part of their responsibilities a duty to protect the property of their employer. Indeed that is to some extent a duty normally devolving on all employees. (see, generally, Batt, *Law of Master and Servant*, p. 208 et seq.). Not all employees with some responsibility to protect the property of their employer will, however, fall within the definition of "guard" within the meaning of section 11 of the Act. As the Board's decisions have indicated one of the concerns of that section is the exclusion from a bargaining unit of guards whose duties and responsibilities would place them in a position of conflict between the interests of their employer and the interests of their fellow employees in the bargaining unit. (*George A. Crain & Sons Ltd.* 63 CLLC ¶16,291, *Disposal Services Limited* [1974] OLRB Rep. Feb. 84).

6. Having regard to the evidence that concern is not substantially present in the instant case. Mr. Knapp is not a licenced constable, is not armed, does not have authority to grant or refuse admission to employees, does not monitor employees as regards security and is not in a position to detain, control, discipline or warn employees, or anyone, for that matter. Therefore his duties as a custodian and watchman do not bring him within the exclusion contemplated in section 11 of the Labour Relations Act.

7. The Board further finds that all employees of the Respondent Company at Lindsay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. A certificate will issue to the applicant.

1185-77-U Service Employees' International Union, A.F.L.-C.I.O.-C.L.C., (Complainant), v. **Western Fair Association**, (Respondent).

Practice/Procedure – s.79 – Whether witness being crossexamined must be supplied in advance with particulars of questions relating to alleged improper conduct.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and M. J. Fenwick.

APPEARANCES: *Ted Wohl, Jack Nicholls and Gerry Jeffrey for the complainant; Donald J. McKillop, Q.C., E. D. McGugan and C. Micallef for the respondent.*

DECISION OF THE BOARD: December 29, 1977

1. This is a complaint filed under section 79 of The Labour Relations Act alleging a violation of section 58 of the Act.

2. At the hearing called for December 14, 1977 and during the cross-examination of the respondent's chief witness, counsel for the complainant sought to put a question to the witness relating to alleged improper conduct by the respondent. The Board refused to permit the question on the ground that the complainant had not supplied particulars of the allegation. Counsel for the complainant then requested permission to serve particulars in view of the fact that it was then evident that the hearing of this complaint would have to be adjourned over to another day because of the number of witnesses yet to be heard. The Board then adjourned the hearing without having ruled on the complainant's request.

3. Upon review of the Board's jurisprudence in this matter we are now of the opinion that counsel for the complainant should have been permitted to put the question proposed in cross-examination. We adopt the language of the Board in *McGregor Hosiery Mills*, [1976] OLRB Rep. Oct. 583, stating,

"The Board [was] of the view that so long as such information was relevant to the disposition of the issues before us, the questions were properly put during the course of cross-examination. In other words, the Board's technical rules with respect to the requirement for particulars cannot be used (nor were they intended for that purpose) to circumscribe a party's right to full and complete cross-examination. In short, for better or for worse, counsel must assume responsibility for the witnesses he calls to adduce testimony in support of his client's particular cause."

This position is consistent with the decision of the Divisional Court in interpreting section 8 of *The Statutory Powers Procedure Act* (upon which the Board's Rule 47 is based). See *Re Don Howson Chevrolet Oldsmobile Ltd. and Registrar of Motor Vehicle Dealers and Salesmen*, [1974], 6. O.R. (2d) 39 (Div. Court).

4. In respect to the complainant's request for consent of the Board to now file a statement of particulars of the alleged improper or irregular conduct, on which he intends to adduce evidence, the Board is of the opinion that such consent should be granted. In grant-

ing the request, the Board is primarily moved by the fact that it was necessary to adjourn the hearing for other reasons and that prompt serving of particulars by the complainant following this rule will preclude any resulting prejudice to the respondent.

1138-76-R The Staff Association of the Children's Aid Society of Metropolitan Toronto, (Applicant), v. **Children's Aid Society of Metropolitan Toronto**, (Respondent).

Employee – Whether social work supervisors are managerial.

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Maurice A. Green for the applicant; T. F. Storie and Anna Bowman for the respondent.*

DECISION OF VICE-CHAIRMAN KEVIN M. BURKETT AND BOARD MEMBER F. W. MURRAY: January 10, 1978

1. This is an application for certification. In a decision dated July 6, 1977, the Board certified the applicant pursuant to section 6(1a) of the Labour Relations Act as bargaining agent for all employees of the Children's Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto, save and except Department Heads/Executive Director and persons above the rank of Department Head/Executive Director, Assistant Property Manager, Personnel Officers, Planning Analysts, Secretaries to the Executive Director, Secretary to the Executive Assistant, Secretary to the Assistant Executive Director, Secretary to the Director of Planning and Development, Secretaries to the Branch Director, Secretary to the Director of Personnel and Training, Secretaries-Personnel, and Secretary to the Labour Relations Manager, *Social Work Supervisor, Child Care Supervisor, Office Supervisors, General Service Supervisor, Volunteer Supervisor, Volunteer Supervisor/Co-ordinator, Maintenance Superintendent, Training Officer, Health Service Co-ordinator, Co-ordinator Foster Parents Association*, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week. The Board informed the parties that the issuance of a formal Certificate must await its ultimate determination with respect to those in the disputed classifications as underlined above.

2. The parties were successful in reaching an agreement with respect to all but one of the disputed classifications. The parties are agreed that the Branch Office Supervisors, General Service Supervisor and Volunteer Supervisor should be included within the bargaining unit. The parties are further agreed that the Child Care Supervisors, Office supervisor in Finance and Administrative Services, Volunteer Supervisor/Co-ordinator, Maintenance Superintendent, Training Officer, Health Service Co-ordinator and Co-ordinator Foster Parents Association should be excluded from the bargaining unit. The parties were unable to agree as to the inclusion or exclusion of those in the classification Social Work Supervisor and accordingly, the Labour Relations Officer met with the parties in order to

determine the duties and responsibilities of those in the disputed classification. The parties agreed that the evidence of Miss J. Davis and Mr. J. Ziliotto, Social work Supervisors would be representative of the duties and responsibilities of all of those in the classification Social Work Supervisor.

3. Section 1. (3) (b) states:

“1.(3) subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

4. The effective operation of the system of labour relations which presently exists in this jurisdiction is based on an underlying recognition of the inherent differences between employer and employees and a need for an arm's length relationship between the employer, as embodied by those who exercise managerial function or are employed in a confidential capacity in matters relating to labour relations, and the employees. The purpose of Section 1(3) (b) of the Act is to ensure that persons who in the opinion of the Board exercise managerial functions or are employed in a confidential capacity do not find themselves faced with a conflict of interest because of a shared bargaining interest with other employees. Persons who exercise such functions are deemed not to be employees pursuant to section 1(3) (b) of the Act and as a result are denied access to the collective bargain process thereby maintaining the necessary arm's length relationship which is fundamental to the process of collective bargaining as established by the Act.

5. The union asked the Board to weigh the evidence of the duties and responsibilities of the Social Work Supervisor in light of the professional work setting within which they function. Counsel for the union likened their relationship with their subordinates to that of a Head Nurse in a hospital and the registered nurses under her supervision. He cited a number of cases wherein the Board has found that the supervision and direction of the Head Nurse is more in the nature of professional assistance than managerial function within the meaning of Section 1(3) (b) of the Act. He referred the Board to the *British Columbia Telephone* decision, B.C. Board File 555-360, February 26, 1976, as supportive of the proposition that in a large organization, occasional managerial function does not deprive a person of the benefits of collective bargaining and secondly, that independent decision making, as distinct from effective recommendations, must be the test as to whether an employee is managerial. In finding that all persons employed as “managers” in the Marketing Department of the British Columbia Telephone Company were employees within the meaning of the Canada Labour Code, the Canada Board commented as follows in the *British Columbia Telephone* decision (supra):

“In many large enterprises, the tasks of preparing the documentation which will be a key input in the decision-making process or of ensuring that a decision is being effectively implemented have been entrusted to highly skilled white-collar employees or to professionals. Often, these persons are known as “managers.” But the importance of the role of these “knowledge workers,” as the applicant calls them, does not de-

tract from the fact that their role is that of a worker or “employee” and not that of a manager.

The existence of a power to recommend instead of a power to decide is often a key indicator of the nature of the role played by a person or a group of persons in an enterprise. It is not just a question of semantics but a means of ascertaining where the real authority and responsibility lie. In such a context, the originator of a recommendation simply provides an input into the actual decision. The fact that recommendations are generally effective does not mean that the focus of the decision-making process has somehow been displaced. It is a reflection of the fact that the author of the recommendation does a good job and it might have much to do with whether or not he is likely to ever become a decision maker, but it does not change the nature of his job which is essentially that of a subordinate, however highly skilled.”

and went on to conclude that:

“... this need to convince, to persuade, to seek another’s consent is not the attribute of a manager, it lies at the very heart of the concept of subordination. This is typically the case whenever a person is given the power to “make recommendations” and this is why a recommendation, even an effective recommendation, is not a decision.”

Counsel for the union asked the Board to find that the Social Work Supervisors employed by the respondent do not enjoy a power of independent decision making as would exclude them from the operation of the Act and that whereas they supervise and provide direction, this is in the way of professional assistance and not managerial authority.

6. Counsel for the respondent employer referred the Board to the leading *Falconbridge Nickel Mines Limited* case [1966] OLRB Rep. Sept. 379, and asked the Board to apply the traditional criteria of managerial authority as set-out therein to the evidence before it and find the Social Work Supervisors not to be employees within the meaning of the Act.

7. The Board in the *Inglis Limited* decision, [1976] OLRB Rep. June 270, recognized that for purposes of a determination under Section 1(3)(b) of the Act, managerial authority may take a number of forms, each of which must be assessed having regard to the purpose of the statute. The Board made it clear in the *Inglis* decision that, whereas it would look to independent decision making in determining the employee status of a manager whose function does not directly impinge upon the employment relationship of others, it would continue to look to effective recommendation in determining the employee status of a manager or supervisor whose function affects the employment relationship of others. (See also *Chrysler Canada Limited* [1976] OLRB Rep. Aug. 396.) In rejecting “independent decision making” as the exclusive or sole test of managerial function, the Board commented in the *Inglis* case as follows:

“It is helpful to note at this point that there are two types of persons whose recommendations can potentially affect the terms and condi-

tions of employment and/or the employment relationship. There is the first line supervisor, traditionally referred to as the foreman who directs the daily flow of work and who may or may not be responsible for a number of ancillary matters such as the imposition of discipline, the granting of time off, the scheduling of overtime, the recording of attendance etc. He may even hire and fire. There is also the technical expert whether it be in the area of time study, methods or process engineering whose responsibilities and decision making capabilities can affect not only terms and conditions of employment (i.e. incentives, production bonus) but the employment relationship itself (i.e. lay-off). The Board in assessing the duties and responsibilities of a front line supervisor has been cognizant of the policy and organizational restraints which now dilute his decision making authority and has developed the test of "effective recommendation."

"This concept has come to mean that if a person spends most of his time supervising the work of others *and* makes effective recommendations that materially affect the conditions of employment of those supervised, the Board may conclude that such persons are exercising managerial functions. In this sense an effective recommendation is a serious recommendation that the evidence demonstrated is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees." (See *McIntyre Porcupine* case, *supra*.)

The Board recognizes that although the foreman may not have the final and undisputed authority which he once did, his power of effective recommendation with respect to discipline, promotion, demotion, time off etc. is a managerial function within the meaning of section 1(3)(b). The foreman who effectively recommends in these areas would find himself in a conflict of interest if placed in a bargaining unit with other employees. It is important to note that it is not the supervisory aspect of his function per se which creates the potential for conflict but the power of effective recommendation as it effects the employment relationship of other employees."

The Board in that case then went on to distinguish between technical experts or managers whose function directly affected the employment relationship and those whose function did not and commented at paragraph 9 therein as follows:

"... Board has seen fit to apply the test of effective recommendation to persons engaged in the supervision of others (paragraph 6 herein) because a person engaged in supervision who makes effective recommendations as regards terms and conditions of employment would be compromised if placed within a bargaining unit of other employees. Similarly, a technical expert or mid-management person who makes effective recommendation (of the type contemplated in the *Algoma Steel* case, *supra*) with respect to terms and conditions of employment should likewise be excluded. A confusion arises when the test of effec-

tive recommendation is applied to technical experts or middle management personnel whose functions are distinct and apart from employee relations. In the *Hydro* case, (supra) the Board was dealing with two types of technical experts; the work study technician whose expertise related to conditions of employment, and public relations persons whose expertise was in areas distinct and apart from employee relations. The Board applied the test of independent decision making as recounted in paragraph 8 herein to both the work study technicians and the public relations personnel and did not distinguish between the two. A proper application of the section, however, requires that a distinction be drawn. A person who is engaged in a function which does not have a direct bearing on conditions of employment should not be excluded from the Act unless he is charged with independent decision making responsibility as that term has been used by the Board. The making of effective recommendations which can have no effect on terms and conditions of employment does not place a person in a conflict of interest situation vis-a-vis labour relations and is not sufficient, therefore, to cause a person to be excluded from the operation of the Act."

The Board concluded:

"In answer to the question raised at the outset of this paragraph the Board states that persons engaged in a function with little or no impact on employee relations must be judged to be managerial on the basis of independent decision making responsibility, whereas persons who make "effective recommendations" which can affect the employment relationship must be judged on the basis of these recommendations to also exercise managerial functions within the meaning of section 1(3)(b) of the Act."

8. The function of the Social Work Supervisor within the respondent's organization clearly has a direct bearing on the employment relationship of those in the bargaining unit and accordingly, the relevant test is whether the Social Work Supervisor enjoys a power of effective recommendation over the employment relationship of these other employees.

9. The evidence establishes that the Social Work Supervisors assign cases to those in the bargaining unit and are responsible for supervising and monitoring the handling of these cases. The Social Worker is expected to file with his/her supervisor a written report on each case within 21 days of having been assigned. The Social Work Supervisors are responsible for administering the recorded policies and implementing the predetermined procedures of the respondent with respect to their individual areas of responsibility. Whereas these functions indicate that Social Work Supervisors act as a conduit for management, they do not in and of themselves establish that the Social Work Supervisors perform managerial functions within the meaning of section 1(3)(b) of the Act. The evidence does establish, however, that the Social Work Supervisors play an active role in the hiring of bargaining unit employees. The Social Work Supervisor takes part in the interview and selection process and can make "effective recommendations" in respect of the ultimate hiring decision. The evidence also establishes a power of "effective recommendation" with respect to the firing and/or discipline of bargaining unit employees. The Social Work Supervisor is re-

quired to submit a written performance evaluation for each probationary employee under his/her supervision which forms the basis upon which a decision is made as to the continued employment of the probationary employee. The Social Work Supervisor is also required to file an annual written evaluation of each bargaining unit employee under his supervision. These evaluations can affect future promotions. The employer instituted a formal grievance procedure prior to the certification of the union. The procedure continues to operate and the evidence establishes that the Social Work Supervisor is the employer representative at the first step. The Board is satisfied on the basis of this evidence that the Social Work Supervisors perform more than a conduit function. In accord with the conclusions reached in the *Inglis* decision (supra), their power of effective recommendation in respect of the terms and condition of employment of those in the bargaining unit, when coupled with their grievance responsibilities, must be construed as managerial functions within the meaning of section 1(3)(b) of the Act.

10. The Board, in assessing the duties and responsibilities of those whose employee status is disputed, must not lose sight of the objective of the certification process which is to facilitate the adversarial process of collective bargaining. This is the process which the parties to this matter are now engaged. The integrity of the process demands that those whose job responsibilities would involve them in a conflict of interest if allowed to bargain collectively be excluded from the operation of the Act. Notwithstanding the professional qualifications of both the Social Work Supervisors and those whom they supervise, the evidence establishes that their potential to affect the employment relationship of others clearly exceeds that of the Head Nurse in either the *Toronto East General* case, [1974] OLRB Rep. Oct. 671, or the *St. Peter's Hospital, Hamilton* case [1975] OLRB Rep. March 247. Their duties and responsibilities require that their loyalty be undivided and that they be capable of exercising their judgment on matters relating to the employment relationship unencumbered by a shared bargaining interest with those whom their recommendations affect. Within the respondent's organization, the Social Work Supervisor make "effective recommendations" which affect the employment relationship of those in the bargaining unit and accordingly the Board must find that the Social Work Supervisors perform managerial functions within the meaning of section 1(3)(b) of the Act and are not, therefore, employees for purposes of the Act entitled to engage in collective bargaining.

11. Having regard to the agreements of the parties as set out in paragraph 2 herein and to the finding of the Board as set out above, the Board can now issue a formal certificate to the applicant. The Board hereby finds all employees of the Children's Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto save and except Department Heads/Executive Director and persons above the rank of Department Head/Executive Director, Assistant Property Manager, Personnel Officers, Planning Analysts, Secretaries to the Executive Director, Secretary to the Executive Assistant, Secretary to the Assistant Executive Director, Secretary to the Director of Planning and Development, Secretaries to the Branch Director, Secretary to the Director of Personnel and Training, Secretaries – Personnel, and Secretary to the Labour Relations Manager, Social Work Supervisors, Child Care Supervisors, Office Supervisor in finance and administrative services, Volunteer Supervisor Co-ordinator, Maintenance Superintendent, Training Officer, Health Service Co-ordinator Foster Parents Association, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week to be a unit of employees appropriate for collective bargaining.

Clarity Note: The Branch Office Supervisors, General Service Supervisor and Volunteer Supervisor are included within the bargaining unit.

DECISION OF BOARD MEMBER O. HODGES:

1. I have read the reasons given by the majority of the Board and wish to set out my own views of this case. In my opinion, the Social Work Supervisors exercise *supervisory* and *professional* functions but they do not exercise *managerial* functions.
2. The Social Work Supervisors are social workers who lead a team of approximately 5 social workers and one or two clerical staff members. One of their chief functions is the assignment of new cases. The social workers on the team have differing areas of expertise and varying amounts of experience. An assignment of any new case is made after the supervisor assesses the complexity of the case, the qualifications of the workers and the distribution of the existing caseload. The supervisor then monitors the progress of the case by means of consultations with the individual workers and the weekly team meetings. At the weekly meetings the team members discuss many of their cases, the overall management of caseloads and any other problems that arise. At these meetings the supervisor can inform the team members of policy changes and instructions from management. The supervisor attends a weekly meeting with supervisors and their superiors. Miss Davis in her evidence stated that "the purpose of those meetings is to provide supervisors with information. It's a communication between management and front line staff." No decisions with respect to overall agency policy are made at these meetings although certain 'housekeeping decisions' for the district may be made.
3. The supervisor will also be carrying a caseload. In the case of Miss Davis, less than 10% of her time was spent on her own caseload. However, during a period of staff shortage Mr. Ziliotto spent most of his time handling his own cases. At the time of his examination 20%-30% of his time was spent on his own caseload.
4. Each supervisor has a duty to keep the superior, a District Head, up to date with developments on the team.
5. If the team decides that a child should be admitted by the agency the social worker involved and the supervisor must obtain the approval of the admission review committee before admitting the child. This committee will include the District Heads. If an emergency admission is necessary, the social worker will advise the supervisor. The supervisor must advise one of the District Heads or the Branch Heads before admitting the child. However, if they are unavailable the supervisor can authorize the admission but an account must be made to the superior as soon as possible.
6. The majority of the supervisors' time is spent performing the above functions – especially the "indirect casework". In performing these functions – assignment of cases, consultation and monitoring of caseload, communication of management directives – the supervisor is acting as the senior professional in a team of professionals and clerical support staff. If these were the only functions of the supervisors, it is clear that they, like professionals not specifically excluded by the Act or personnel who are supervisory only, would not be excluded from collective bargaining.

7. However, the majority of the Board has examined the supervisor's power of "effective recommendation" and concluded that their power of effective recommendation with respect to hiring, firing and discipline of bargaining unit employees is sufficient to warrant the conclusion that the supervisors exercise managerial functions.

8. Although the supervisors have a role in the hiring process, the evidence reveals that this role is limited by several factors. Prior to the supervisor participating in an interview with a job applicant, several screenings of candidates may have occurred. Initially the personnel department screens applicants. Then the District Head will review the applications and determine who is to be interviewed. The candidates selected will then be interviewed jointly by the supervisor and the District Head. The supervisor may, as a continuation of this interview or as part of a separate interview, meet with the applicant alone. Mr. Ziliotto gave evidence that the candidate would then meet with the other members of the team. Miss Davis, on the other hand, had a candidate meet the team after a recommendation was made. The District Head makes the final decision with respect to who will be hired. Miss Davis appears to have been involved in recommending approximately 5 candidates to permanent staff in 5 years as supervisor. In one case there was only one applicant and in another only one application was pursued. In all cases, she and her District Head were in agreement about who should be hired. On one occasion when the position of District Head was vacant she was given authority to interview an individual alone. Since the position of District Head was vacant she made her recommendation to the Branch Head. This appears to be the only time the District Head did not interview the candidate.

9. Likewise Mr. Ziliotto was given permission to interview candidates for one position when the District Head was on vacation. He recommended the hiring of one of these candidates but his District Head decided not to hire the individual he recommended. She interviewed his 'second choice' and this person was eventually hired. Mr. Ziliotto's recommendations reflect a 'joint decision' – he and his team members discuss the candidate and arrive at a decision.

10. It is clear from the evidence that, due to the small size of the team, the supervisor's duties in the interviewing process will not arise frequently. The supervisor may only have an input in the *final* stages of the selection process – the District Head plays an active role in selecting a candidate and alone has the final decision. In addition, the District Head may reject the supervisor's recommendation.

11. Mr. Ziliotto in approximately 1½ years as a supervisor has never been involved in a firing, disciplinary action or grievance procedure.

12. Miss Davis has been involved in the termination of one employee in the 5 year period she has held her present position. She spoke with her District Head each time she had discussions with the employee about performance and her recommendation that the employee be terminated during the probationary period was accepted by the District Head.

13. It would appear that the supervisors would very infrequently recommend a firing.

14. The supervisors must evaluate employees at the end of the first 6 months of employment, then annually thereafter. The annual report is probably important if the employee applies for another job, but a good evaluation will not result in a salary increase, nor is the supervisor able to recommend a wage increase.

15. It has not been demonstrated that the supervisors' powers with respect to hiring, firing and discipline amount to the 'power of effective recommendation'. They are not frequently exercised and they may take the form of confirming the hiring of the one candidate who has been selected by the District Head or who has been the only applicant. The recommendation may not be followed. Also, the decision making process may be even more diffuse – the recommendation may follow an interview with team members and may be the result of the supervisor's and the team's joint decision. In addition, definitions of effective recommendation such as that in the *McIntyre Porcupine* case state that the recommendations must "materially effect the *conditions* of employment of those supervised" [1975] OLRB Rep. April 261 at 289. There are many 'conditions of employment' which the supervisors have a very limited ability to affect. They play no part in setting salary schedules and they do not recommend wage increases. They are unable to change employee hours although they are notified by workers of overtime worked. They, like the workers on the team, submit a summary of overtime hours worked to a secretary who signs this account, returns it to the supervisor for signature then forwards it to the accounting department. The methods of accumulation and compensation for overtime are set out in the agency policy manual and apply to the supervisors in the same way that they apply to other team members. The supervisor is unable to grant a member of her team a leave of absence or time off if the number of hours of overtime prescribed by the manual have not been accumulated. Even in cases such as a death in the family, the supervisor must get a superior's permission before granting a team member time off if the employee has not accumulated overtime hours. With respect to vacations, the supervisor will review the requests for vacation periods and ensure there is coverage. The supervisor will give this information to a superior. Although the supervisor can authorize certain expenditures, they cannot exceed \$200. These expenditures are generally for assistance to families with whom the agency is dealing.

16. This Board in *Chrysler Canada Limited* [1976] OLRB Rep. Aug. 396, a case decided subsequent to the *Inglis* decision [1976] OLRB Rep. June 270 indicated that "there is no general criterion that is suitable for the resolution of all situations" (p. 400, para. 14). The 'effective recommendation test' is not conclusive, even in cases where a person is able to affect the conditions of employment of employees. The Board in *Chrysler* emphasized that each situation must be dealt with on an individual basis due to the different forms the exercise of managerial functions may assume. It stated the Board's general approach – that "the more directly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to effective control or authority over other persons as the criterion" (p. 400, para. 13). In this case, the professional aspects of the majority of the supervisors' functions, the team approach to problem solving and goal attainment as well as the limited degree to which the supervisor is able to affect or control the team members' conditions of employment indicates that the supervisors do not exercise managerial functions within the meaning of section 1(3)(b).

17. This case illustrates some of the problems with the 'effective recommendation test' and indicates some of the reasons why this Board should be wary of applying such a test. The test itself is ambiguous – it is unclear how frequently such powers should be exercised before concluding they are a person's function, how formalized such input must be before it is a recommendation, and how much of a factor this input must be in the decision making process. More importantly, many people who are proper participants in the collective bargaining process may be excluded. In this case, the supervisors' interests are distinguishable from those of management. The ratio of supervisor to 'those supervised' is very

low. The supervisor has a very limited area outside of the area of professional expertise in which discretion or decision making may be exercised. Most of those supervised are qualified professionals and are dealt with as co-workers or team members rather than subordinates. The team concept which is agency policy stresses co-operation, group decision and communication within the team rather than an adversarial management-employee relationship. As 'team leader' many of the supervisor's interests are the same as the interests of team members and are clearly distinguishable from those of management. The fact that supervisors are quite numerous and easily replaceable puts them in a weak bargaining position and emphasizes the undesirability of excluding them from the Act.

18. I find the supervisors are employees for the purposes of the Act, although it may still be argued that they lack a sufficient community of interest to be included in the bargaining unit with the other employees. The evidence and submissions of the parties were not directed to this point but were confined solely to the issue of whether the supervisors were "managerial". Having regard to the evidence set out above and the Board's usual practice respecting "lead hands", I have serious doubt whether the community of interest of the supervisor is so different from that of the other members of the team that they should be excluded from the bargaining unit. However on the basis of the evidence and submissions made to us I am unable to reach a final conclusion on this point. It may be that a bargaining unit comprised only of Social Work Supervisors would be appropriate for collective bargaining.

0089-77-R Retail Clerks, Local 206, Chartered by the Retail Clerks International Association, (Applicant), v. Sunnybrook Food Markets (Keele) Limited, (Respondent).

Certification – Employee – Whether employee exercises managerial responsibilities.

BEFORE: R.A. Furness, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *Alick Ryder, Les Dowling and Rick Sjoerds appearing for the applicant; G. Grossman, S.C. Bernardo and M. Goodbaum appearing for the respondent and Leon J. Labonte appearing for Local 206, National Council of Canadian Labour.*

DECISION OF THE BOARD: January 6, 1978.

1. The applicant has applied for certification with respect to certain of the respondent's employees who are classified by the respondent as either meat manager, produce manager, assistant store manager, kosher meat manager, or grocery manager. These managers are employed at the respondent's store in Metropolitan Toronto.

2. During the course of meetings with the Labour Relations Officer, the parties agreed that Sonny Ramphal, who is classified by the respondent as a grocery manager does not exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act. During the course of these meetings the parties also agreed that the evidence

adduced by Angelo Muto and Lawrence Badali, who are classified by the respondent as produce managers, will stand for Mario Giarrizzo, who is also classified by the respondent as a produce manager, as well as themselves.

3. In a letter dated September 12, 1977, the applicant adopted the position that all departmental managers other than store manager and assistant store manager should be included in the bargaining unit. The Board has considered the Report of the Labour Relations Officer. With respect to the assistant store managers the Board agrees that they should not be included in the bargaining unit. The Board finds that the assistant store manager exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act.

4. Ken Allott is a meat manager and he runs the meat department in the store where he works. His supervisor, Mr. Zucker orders the red meat but Mr. Allott orders the cooked meats, pork, ribs and livers from representatives of the packing houses. There is no guide line on what he may spend on any particular item. He has not been reversed on any of his orders by his superiors and he does not send a copy of his orders to the respondent's head office. Mr. Allott has never authorized overtime and tries to avoid it. He sets the rates of pay within the limits of the collective agreement for the part-time employees who work in his department from time to time. The rates which he has set have never been questioned by anyone. While Mr. Allott is given guide lines to assist him in pricing meat products, the pricing is left to him and as the occasion warrants he goes outside these guide lines. He hires the part-time help without consulting anyone and is unable to recall anyone reversing his decisions in this regard. In the process of hiring the part-time help he contacts the prospective employees and interviews them alone. Mr. Allott has nothing to do with hiring full-time employees. He is the only full-time employee in the meat department in the store where he works. He contacts his superiors when leave of absence of two to three days is requested by a part-time employee. He schedules the work for part-time employees, checks their time cards and has the authority and has granted time off of two hours or an afternoon for an employee to attend to personal matters.

5. Murray Barkwell is also a meat manager at the store where he works. He has only recently assumed this position after being laid off. When he has problems he consults the store manager. There is one full-time employee and two part-time employees working in his department. If dissatisfied with their work he would refer the matter to his supervisor's attention. While Mr. Bankwell notionally has the authority to hire new part-time employees, he would have his supervisor talk to the prospective employee before he was hired and set his wages. He has the authority to grant time off without first speaking to his supervisor but does not have the authority to dismiss an employee. However, much of Mr. Bankwell's evidence with respect to hiring is hypothetical because it has not happened during the short time he has been employed as a meat manager. His comparatively short period of employment is perhaps reflected in the fact that, unlike Mr. Allott, he orders his meat through his supervisor.

6. Alex Frank and Cecil Sloan are employed by the respondent as kosher meat managers in their respective stores. Mr. Frank decides the kind and quantity of meat he wants and he generally sets the prices. He decides whether to change prices to match the competition. However, with respect to "specials" he would discuss them with his supervisors. He orders the meat himself from various sources. In his department there is one person in sales

and a butcher and Mr. Frank tells them when to come to work. He has hired other employees and when a busy period is over he decides who is to be laid off and when they are to be laid off. He communicates the decision regarding lay off to the employees who are concerned. Mr. Frank authorizes overtime without asking anyone, sets the rates of pay for the part-time employees and has granted casual time off.

7. Mr. Sloan buys meat on a daily basis and within guidelines which are set by the respondent he sets the prices of the meat. He chooses the types of meat which are sold and is not allotted a certain amount of money for the purchase of such meat. A counter-girl, a butcher and a part-time meat clerk are under Mr. Sloan's control and he prepares their schedules for work. He is responsible for the quality and quantity of their work and he instructs them on the proper method of doing their work. He has been told by his supervisor that he has the authority to dismiss employees. Mr. Sloan has hired part-time help without consulting anyone and he sets the rates of pay for part-time employees within the terms of the collective agreement. He has the authority to give raises to the part-time employees on his own judgment and authorizes overtime when necessary. In addition to his power to hire part-time employees, he also decides who is to be laid off. After hirings and lay offs he tells his supervisor what he has done. Mr. Sloan grants time off and has permitted the counter-girl to take a week off without discussing such action with anyone.

8. Angelo Muto, Lawrence Badali and Mario Giarrizzo are employed by the respondent at various stores as produce managers. Mr. Badali sets the price of merchandise in his department based upon a schedule which he receives from Mr. Goodbaum. Mr. Badali sets his own price as a mark up and as a gauge he usually visits other stores and checks on them. His prices have never been reversed by anyone. He uses his own formulae for pricing various items and sometimes puts items on "specials". Mr. Badali determines the days he will work. He has no one under his control and has never hired, dismissed or reprimanded an employee. While Mr. Badali has been a produce manager for the respondent for seven years, Mr. Muto has occupied a similar position for about one year. Mr. Muto has a produce clerk who works for him and both of them determine the days on which the produce clerk comes in to work. The produce clerk was hired by the respondent's head office and Mr. Muto does not hire or dismiss employees. He is not consulted on reductions in staff. The head office purchases the fruit and determines the selling prices. From time to time Mr. Muto sets the selling price when he puts fruit on "special" and decides on overtime. If someone wanted time off for a dental appointment he would ask the manager of the store about granting such a request.

9. Although Mr. Allott and Mr. Barkwell are both meat managers their duties and responsibilities are quite different. On the one hand Mr. Allott has effective control of his meat department and exercises independent discretion with respect to his department. He exercises considerable discretion in the purchase and selling price of meat. With respect to the part-time help he hires them, fixes their rates of pay within the terms of the collective agreement, schedules their work, checks their time cards and grants time off for personal matters. Having regard to his degree of independent discretion and the extent of his supervisory powers over the part-time employees, the Board finds that Ken Allott exercises managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act. On the other hand Mr. Barkwell orders meat through his supervisor and the extent of his real authority over other employees in his department is unclear. The evidence suggests that, since he would turn to the store manager or his supervisor in the event that he has problems on

the job, his actual authority over such employees is minimal. On considering the evidence with respect to Murray Barkwell, the Board is not prepared to find that he either exercises independent discretion or possesses supervisory authority over other employees so as to support a finding that he exercises managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act.

10. The two kosher meat managers Alex Frank and Cecil Sloan each exercise a considerable amount of independent discretion in the purchase and in fixing the selling price of meat. They also possess and exercise a wide degree of supervisory authority over the employees who work with them. The Board finds that Alex Frank and Cecil Sloan each exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act.

11. Lawrence Badali and Angelo Muto are employed by the respondent as produce managers. However, their duties and responsibilities are quite different. Mr. Badali uses his own formula for computing the selling price of produce and decides which days he works. While he does not exercise any supervisory powers over any other employee he does exercise a degree of independent discretion. The Board finds that Lawrence Badali exercises managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act. Mr. Muto has very limited powers of independent discretion and no supervisory control over the clerk who works with him. He does not purchase or order the produce. The head office determines the selling price of the produce and hired the clerk. While Mr. Muto sets the selling price on specials and decides on overtime, such matters do not appear to be anything more than an incidental part of his job. While an employee may exercise minor discretionary functions, if such functions are merely incidental to his main function and are of such a nature that they may not be said to materially affect the employment relationship, then such minor discretionary functions do not make the employee a member of management. See the *Falconbridge Nickel Mines Limited* case, [1966] OLRB Rep. Sept. 379. The Board finds Angelo Muto does not exercise management functions within the meaning of section 1(3)(b) of The Labour Relations Act.

12. The question concerning the status of Mario Giarrizzo is a difficult one. The parties have asked to have applied to him the evidence of Messrs. Badali and Muto. However, the Board has determined that Mr. Badali exercises managerial functions within the meaning of section 1(3)(b) and that Mr. Muto does not exercise managerial functions within the meaning of section 1(3)(b). The agreement of the parties to have the evidence of two persons apply to a third person in the context of this application makes it impossible for the Board to determine whether or not Mario Giarrizzo exercises managerial functions within the meaning of section 1(3)(b). In this regard the Board refers the parties to its *Prctice Note No. 4*. Since a determination with respect to Mr. Giarrizzo would not affect the result of this application and since the parties have placed their evidence before the Board, we are of the view that rather than refer this matter to the Labour Relations Officer the parties should refer his status for determination pursuant to section 95(2) of The Labour Relations Act in the event that they cannot resolve the question of his status.

13. At the conclusion of his argument counsel for the respondent made a plea that the Board issue a decision that "the parties can live with". On the basis of the agreement of the parties and the determinations of the Board, Sonny Ramphal, Angelo Muto and Murray Barkwell do not exercise managerial functions within the meaning of section 1(3)(b) of

The Labour Relations Act. One produce manager is affected by this application and the other is not. One of four meat managers and kosher meat managers is affected by this application and the other three are not. The Board appreciates that such determinations may create difficulties for both parties. However, the differentiations which the Board has made in this decision are related to the evidence before it and for which the parties are responsible. It appears to the Board that the respondent confers greater powers of authority and independent discretion on the managers who have been employed for longer periods of time. Messrs. Muto and Barkwell are comparatively new as managers for the respondent and clearly have less powers of authority and independent discretion than other managers. It may well be that the respondent's managers acquire more powers of authority and independent discretion as they perform to the respondent's satisfaction. If it was intended, however, that all managers exercise certain minimum attributes of managers then the respondent could clearly have spelled this out. The respondent has clearly not formalized the authority and discretion of its managers. The failure of an employer to clearly inform its personnel of their duties of necessity weighs against its claims when the status of an employee under The Labour Relations Act is in question. See the *Riverview Health Association* case, [1966] OLRB Rep. June 74, the *Brockville General Hospital* case, [1967] OLRB Rep. June 776 and *The Burlington-Nelson Hospital* case, [1971] OLRB Rep. 2.

14. The parties argued before the Board whether this application related to the respondent's retail stores alone or also included head office employees as maintained by the respondent. The Board finds that this application relates to the respondent's retail stores in Metropolitan Toronto and not to the respondent's head office employees. While the applicant's description of the proposed bargaining unit could have been more precisely worded, paragraph seven of Form 1, Application For Certification, leaves no room for doubt about the employees for whom the applicant is seeking certification. In addition, at the first hearing the applicant clearly referred to the number of employees who are affected by this application. In our view, the respondent should have been aware of the extent of this application from the time it first received notice of this application.

15. The applicant is seeking what is essentially a tag-end bargaining unit. The Board finds that all employees of the respondent at its retail stores in Metropolitan Toronto, save and except assistant store managers, persons above the rank of assistant store manager and persons covered by an existing collective agreement, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. For the purpose of clarity the Board declared for the reasons which have been given in this decision that the following persons are not included in the bargaining unit:

- Ken AllottMeat Manager
- Lawrence BadaliProduce Manager
- Alex FrankKosher Meat Manager
- Cecil SloanKosher Meat Manager

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the

application was made, were members of the applicant on April 25, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

1205-77-R United Steelworkers of America, (Applicant), v. Royce Enterprises, (Respondent).

Certification – Employee – Whether employee exercises managerial responsibilities.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members F.D. Kean and H. Simon.

APPEARANCES: *Burriss Ormsby and E. Hurst for the applicant; Anthony DeJong for the respondent.*

DECISION OF THE BOARD: January 31, 1978.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant has applied to be certified as the bargaining agent for all office, clerical and technical employees of the respondent company at Orillia, Ontario, save and except supervisors and persons above the rank of supervisor. In view of the fact that there is only one individual who would fall within this bargaining unit, the applicant has requested that the individual, Ms. Jackie Whelan, be included in the bargaining unit applied for in file No. 1206-77-R, for which the Board issued an interim certificate on November 25, 1977, pending the resolution of Ms. Whelan's status and a decision regarding the appropriateness of her inclusion in that bargaining unit.
4. The respondent objects to Ms. Whelan's inclusion in any bargaining unit on the grounds that she falls within the exclusion under section 1(3)(b) of the Act, namely, that she exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.
5. In determining whether an individual exercises managerial functions within the meaning of section 1(3)(b) of the Act, the Board has identified two basic situations. The first is where the individual may directly affect the terms and conditions of employment and/or the employment relationship, such as a foreman who supervises employees or a technical expert, such as a study technician, who makes recommendations that may affect terms and conditions of employment. The second type of situation is one where a person's functions

have virtually no impact on the employment relationship, such as a supervisor of non-employees or certain directors of advertising who deal with the public rather than employees. Naturally there are many possible mixtures of these two basic categories; they may best be seen, therefore, as marking two ends of a spectrum.

6. Over the years the Board has found that the most helpful guideline for determining whether somebody in the first category exercises managerial functions within the meaning of section 1(3)(b) of the Act is to determine whether or not they exercise effective control or authority over employees. For example, if a person in this situation makes effective recommendations or serious recommendations which the evidence shows are normally acted upon and these recommendations materially affect the conditions of employment, the Board may well conclude that the person is exercising managerial functions. (See *Inglis Limited*, [1976] OLRB Rep. June 270.)

7. On the other hand, the Board has found that a person who is engaged in a function which does not have a direct bearing on conditions of employment should generally not be excluded from the Act unless he is charged with independent decision-making responsibility. The Board has found, in other words, that with people in the second category the making of effective recommendations which have little or no effect on the terms and conditions of employment would normally not place a person in a conflict of interest situation with management if included in the bargaining unit. In these circumstances, therefore, the making of such recommendations would generally not, in itself, be sufficient to exclude an individual from the operation of the Act. (See *Inglis Limited*, supra.)

8. With respect to being employed in a confidential capacity within the meaning of section 1(3)(b) of the Act, the Board looks to whether or not the person is regularly involved in a material way with matters relating to labour relations which are confidential because their disclosure would adversely affect the interests of the employer. An important aspect of the test is whether or not the exposure to confidential information on matters relating to labour relations is sufficiently consistent to become an integral part of the employee's service to the employer's enterprise (see *York University*, [1975] OLRB Rep. Dec. 945).

9. Ms. Whelan described her duties as including purchasing, production control, payroll, bookkeeping, invoicing, costing, answering the phone, and scheduling production. The evidence discloses no instances of her scheduling production. With respect to the purchasing, which her supervisor, Mr. DeJong, testified takes no more than a half-an-hour a day, Ms. Whelan orders basic materials, replacement parts for machinery, tools and hardware. In determining what should be ordered, Ms. Whelan has a stock system so that she knows what raw materials are needed. Furthermore, she can discern from the orders which come in what other materials are required. If materials for maintenance or the tool room are needed, the maintenance man informs Ms. Whelan and she then orders what he wants. Ms. Whelan testified that before purchasing any item she shops around to get the best price. When asked who makes the decision as to where to buy an item, she said, "I guess I do. It's always who has the best delivery and the best prices, is the obvious one who gets the order". Ms. Whelan does not do the purchasing for machinery. Although she signs the orders, she testified that it is Mr. DeJong who actually chooses and orders the machinery.

10. For production control, Ms Whelan issues a work order when the stock gets down, itemizing the quantities required and the dates by which particular items are needed.

Ms. Whelan plays no part in establishing the staffing requirements that are necessary to fulfill these orders. The evidence indicates that the production control function is one of systematically relating to others information on the state of the employer's stock. When she issues a "work order" it is given to Mr. Dewhurst, the supervisor, who then in conjunction with Mr. DeJong determines how that order will be met. With respect to overtime, Ms. Whelan testified that on occasion she may make the recommendation that extra time should be put in because production is getting behind.

11. Ms. Whelan's invoicing duties involve writing out cheques for the materials. It is Mr. DeJong, the supervisor, who signs them. Recently, Ms. Whelan has taken over the responsibility of doing the bookkeeping for the company. Because of the newness of the duty, Ms. Whelan couldn't give too much detail as to what was involved but she indicated that an outside accountant comes once a year to take care of the year-end matters. She testified as well that she does not prepare a profit and loss statement for the employer, nor does she have any involvement in the making up of a budget. For payroll and costing, Ms. Whelan figures out the daily earning cards, that is, what the employees do each day; then once a week she writes out the pay cheques which are signed by Mr. DeJong or his son. She has nothing whatsoever to do with pay increases.

12. Ms. Whelan does not keep minutes of management meetings. She stated that at times she will get together with management and discuss things like production. She said that she might be asked for her opinion and that she might make some recommendations as to how things should be done; she indicated that her recommendations are now and again put into effect.

13. Ms. Whelan testified that she has no people under her direction or control, that she has no involvement in hiring, that she has never fired anyone, disciplined anyone nor laid anyone off; furthermore, she makes no decisions with respect to staffing requirements.

14. The evidence indicates that Ms. Whelan's duties do not generally affect the employment relationship of individual employees. Accordingly, in determining whether or not Ms. Whelan exercises managerial functions within the meaning of section 1(3)(b) of the Act, the Board must generally look to whether or not she exercises independent decision-making authority. Ms. Whelan makes no decisions related to the ordering of machinery. With raw materials she makes orders to keep up the stock and to meet the needs of orders that have come in. For maintenance materials and tools, she orders what the maintenance department asks her to order. Although Ms. Whelan herself determines from whom an order will be purchased, this decision is based on the elementary assessment of where she gets the best price and delivery. Having regard to all the evidence of her buying function, the Board is satisfied that her discretion is largely exercised within pre-determined parameters and does not constitute sufficient independent decision-making authority to be indicative of a managerial position. Although the cash expenditures which Ms. Whelan may authorize are of some magnitude, this in itself would not cause the Board to find that she is managerial.

15. In assessing Ms. Whelan's bookkeeping, invoicing, payroll and production control duties, the Board finds no evidence of her exercising independent decision-making authority. With the invoices and payroll, she writes out the cheques; it is her supervisor that must sign them. Her production control function is generally one of relaying information on the state of the stock.

16. For the reasons given above, therefore, the Board is satisfied that Ms. Whelan does not exercise managerial functions within the meaning of section 1(3)(b) of the Act.

17. As well, the Board finds nothing in the evidence to indicate that Ms. Whelan has any regular or material involvement with confidential information on matters relating to labour relations such that their disclosure would adversely affect the interests of the employer. Even when Ms. Whelan issues a work order indicating that certain items need to be produced, the information is not confidential because it is posted on a production board.

18. The Board is satisfied, therefore, that Ms. Whelan is not encompassed by the provisions of section 1(3)(b) of the Act and is, therefore, eligible for inclusion in a bargaining unit.

19. We turn now to consider whether Ms. Whelan should be placed in the production unit or whether she must remain in the separate office unit. Consistently the Board has viewed the office employees and plant employees as divergent, that is, as having separate communities of interest. The Board, therefore, traditionally places them in two separate units. If in this case, however, we were to follow the normal practice, Ms. Whelan, who has indicated a desire to be represented by a union, would be deprived of union representation because she is the sole person in the proposed office unit. Under the terms of section 6(1) of the Act, the Board is unable to certify a union as the exclusive bargaining agent for a bargaining unit that would consist of only one employee. In circumstances of this nature, the Board has developed the policy of departing from its normal practice respecting the appropriateness of bargaining units. For example, in *P.F. Collier & Son Limited*, [1966] OLRB Rep. Sept. 408, the Board stated that,

“One of the exceptional circumstances which has caused the Board to depart from its usual practice [of placing office employees in a bargaining unit separate and apart from other employees] is the instance where there is only one employee employed in an office who would be eligible for collective bargaining and who is claimed by the applicant union as a member. In such a case, the Board has included such an office employee in the same bargaining unit as other employees because the sole office employee would otherwise be deprived of the right to collective bargaining which he has indicated he desires.”

20. Accordingly, in the circumstances of this case, the Board finds that Ms. Whelan should be included in the unit applied for in File No. 1206-77-R. In that case the Board issued an interim certificate pending the resolution of whether Ms. Whelan should be included in that unit, that is, whether that unit should include rather than exclude the category of office and sales staff.

21. For the reasons detailed above, the Board finds that the appropriate bargaining unit in File No. 1206-77-R is all employees of the respondent company in Orillia, Ontario, save and except foremen, persons above the rank of foreman, and persons regularly employed for not more than 24 hours per week.

22. A formal certificate will issue to the applicant.

1264-77-R Frank Sarcinella, (Applicant), v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, (Respondent), v. **Dad's Cookies Ltd.**, (Intervener).

Termination – Timeliness – Effect of making term of operation of agreement retroactive – Whether prohibited by section 44 of the Act.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members D.B. Archer and C.G. Bourne.

APPEARANCES: *Robin B. Cumine and Frank Sarcinella for the applicant; Harold F. Caley and Stan Miller for the respondent; Donald J. McKillop, Q.C. and Mr. Leathan for the intervener.*

DECISION OF THE BOARD: January 6, 1978.

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent union no longer represents the employees in the bargaining unit for which it is the bargaining agent.
2. The respondent in its reply and at the hearing raised the preliminary question of the timeliness of the application.
3. The respondent was certified as bargaining agent on September 24, 1976 and negotiations ultimately culminated before a Board of Conciliation on July 20, 1977 in a memorandum of understanding which was ratified and subsequently incorporated into a collective agreement between the respondent and the intervening company dated September 12, 1977. All wage retroactivity back to January 1, 1977 was paid by the employer by a cheque issued at the time of ratification and by an additional cheque payment issued at the time of contract execution.
4. The collective agreement sets out in its heading,

“This Agreement made as of this 1st day of January A.D., 1977”

and the duration clause reads as follows:

“19.01 This agreement shall remain in full force and effect from the 1st day of January, 1977 to midnight on the 31st day of December, 1977. The agreement shall continue automatically thereafter for annual periods of one year unless either party notified the other party in writing within a period of ninety (90) days prior to the annual expiration date that it desires to amend the agreement.”
5. The respondent union served notice of its desire to amend the agreement and, prior to the filing of the instant application, an initial meeting between the parties had been arranged to take place on November 29, 1977.
6. The respondent takes the position that section 44(1) of the Act, requiring that a

collective agreement have a term of operation of not less than one year, is applicable and that in the facts of this case where the actual contract was not executed until September 20, 1977 that it only then became operative and should run twelve months from that date – or alternatively, that it should run twelve months from the date of the ratification of the understanding arrived at before the Conciliation Board. The respondent's point is that the employees concerned should have the benefit of a full twelve months of hiring under the collective agreement.

7. In our opinion the collective agreement commenced to operate as of January 1, 1977 (as recited in the agreement) and the current application is proper and timely, made within the last two months of its first year's operation. To find otherwise would negate the clear intention of the parties as is evident on the face of the agreement (as referred to above and Article 19 thereof). The retroactive effect given to the agreement in respect to wages, and the respondent's own conduct in serving notice of desire for amendment are both consistent with and re-enforcing of this conclusion. The conclusion itself is also consistent with satisfying another important labour relations objective, namely, that the employees concerned are entitled from the face of the collective agreement to be able to determine what is the appropriate statutory period at which the performance of their particular bargaining agent may be legally reviewed – by way of change of bargaining agents or by way of withdrawing from collective bargaining.

8. The Board finds that the bargaining unit currently represented by the respondent is,

“all employees of Dad's Cookies Ltd. in the Borough of Scarborough in the Municipality of Metropolitan Toronto, save and except foremen and foreladies, office, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”.

9. The Board is satisfied that not less than forty-five per cent of the employees in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on November 23, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

10. The Board directs that a representation vote be taken of the employees of the intervener. Those eligible to vote are all employees of Dad's Cookies Ltd. in the bargaining unit described in paragraph 8 above.

11. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

12. The matter is referred to the Registrar.

CASE LISTINGS DECEMBER 1977

	Page
1. Applications	
(a) Bargaining Agents Certified	1
(b) Applications Dismissed	8
(c) Applications Withdrawn	11
2. Application under Section 1(4)	11
3. Applications for Declaration Terminating Bargaining Rights	11
4. Applications for Declaration that Strike Unlawful	12
5. Applications for Declaration that Lock-Out Unlawful	12
6. Application for Consent to Prosecute	13
7. Complaints under Section 79 (Unfair Labour Practice)	13
8. Applications for Consent to Early Termination of Collective Agreement	14
9. Application under Section 55	14
10. Applications for Determination under Section 95(2)	15
11. Applications under Section 112a	15
12. Applications for Reconsideration of Board's Decision	16

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1977

BARGAINING AGENTS CERTIFIED DURING DECEMBER

No Vote Conducted

1867-75-R: University of Windsor Faculty Association (Applicant) v. University of Windsor (Respondent) v. Group of Employees (Objectors).

Unit: "all full-time academic staff, including professional librarians employed by the university of Windsor, in the City of Windsor, in the County of Essex, in the province of Ontario, save and except members of the Board of Governors, President, Vice-Presidents, Deans, Associate Dean, University Librarian, Associate University Librarian, Law Librarian and Secretary to the Board of Governors." (648 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. December*).

0645-77-R: Boot & Shoe Workers Union affiliated with the Canadian Labour Congress and AFL-CIO (Applicant) v. Brown Shoe Company of Canada Limited (Respondent).

Unit: "all office and commissary employees of the respondent at Alexandria, save and except the office manager, persons above the rank of office manager and payroll clerk." (6 employees in the unit).

0663-77-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the Regional Municipality of York (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the Regional Municipality of York, save and except office and clerical employees, co-ordinators and persons above the rank of co-ordinator." (19 employees in the unit).

0888-77-R: Christian Labour Association of Canada (Applicant) v. Medi Park Lodges Inc. carrying on business as: Crescent Park Lodge (Respondent) v. Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C. (Intervener).

- and -

0962-77-R: Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C. (Applicant) v. Crescent Park Lodge (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit #2: "all persons regularly employed for not more than 24 hours per week and students employed during the school vacation period by the respondent at its nursing home, Crescent Park Lodge, at Fort Erie, save and except Professional Medical Staff, Registered, Graduate and Undergraduate Nurses, Activity Director, Supervisor, persons above the rank of Supervisor and office staff." (5 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #1 – See Application Certified Subsequent to Post-Hearing Vote*).

0893-77-R: Office and Professional Employees' Internatioal Union (Applicant) v. Supply and Services Union of the Public Service Alliance of Canada (Respondent).

Unit: "all employees of the respondent in its office in the City of Ottawa, save and except Executive Secretary and persons above the rank of Executive Secretary." (5 employees in the unit).

0987-77-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Michaud and Levesque Ltd. (Respondent).

Unit: "all employees of the respondent at its retail stores at Sturgeon Falls, save and except Department Heads, persons above the rank of Department Head, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (13 employees in the unit).

1056-77-R: Niagara Peninsula Beverage Dispenser and Hotel Employees Union (Applicant) v. Local No. 199 U.A.W. Building Corporation (Respondent) v. Hotel and Restaurant Employees Union, Local No. 756, chartered by Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Intervener).

Unit: "all employees employed by the respondent at St. Catharines, save and except Hall Manager, those above the rank of Hall Manager, office and clerical employees, those covered by the present Collective Agreement between the parties, students employed during the school vacation period, those employed for not more than twenty-four (24) hours per week and the chef-supervisor of kitchen staff." (37 employees in the unit). (*Having regard to the agreement of the parties*).

1114-77-R: Retail Clerks Union Local 486 (Applicant) v. Intercity Foods Services Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Cornwall employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers and those above the rank of assistant managers." (5 employees in the unit).

1119-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Waterloo County Roman Catholic Separate School Board (Respondent).

Unit: "all employees of The Waterloo County Roman Catholic Separate School Board engaged in maintenance, services and plant operations regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foremen and office staff." (39 employees in the unit).

1130-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Roma Fence Limited and Fence-All (Respondent).

Unit: "all employees of Roma Fence Limited and Fence-All in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and/or erection of fences, save and except non-working foremen and persons above the rank of none-working foreman." (9 employees in the unit).

1131-77-R: Christian Labour Association of Canada (Applicant) v. Sacro Forming (Respondent).

Unit: "all construction labourers, carpenters, carpenters' apprentices, cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1152-77-R: Ready-Mix, Building Supply, Hydro & Contruction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Foster Wheeler Limited (Respondent).

Unit: “all drivers and warehousemen employed by the respondent on construction projects in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, clerical staff and persons covered by existing collective agreements.” (14 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1977] OLRB Rep. December).

1164-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. A. Shniffer Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at its plant at 52 Orfus Road in Metropolitan Toronto, save and except foremen, persons above the rank of foreman and office and sales staff.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

1200-77-R: Canadian Chemical Workers Union (Applicant) v. Bally Refridgeration of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the Respondent at its Plant in Brockville, Ontario save and except Foremen, persons above the rank of Foreman, Office, Sales, and Technical Staff, and Students employed during the summer vacation period..” (23 employees in the unit). (*Having regard to the agreement of the parties*).

1221-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Parisien Beverages (Cornwall) Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working at and out of Cornwall, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (27 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1977] OLRB Rep. December).

1227-77-R: United Steelworkers of America (Applicant) v. T.P.S. Industries Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Tillsonburg, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (41 employees in the unit). (*Having regard to the agreement of the parties*).

1263-77-R: International Union of Doll & Toy Workers of the United States & Canada, Local 905 (Applicant) v. Aurora Products of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at its plant at Racine Road, in Rexdale, Ontario, save and except supervisors, foremen and foreladies, persons above the rank of supervisor, foreman and forela-

dy, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (42 employees in the unit). (*Having regard to the agreement of the parties*).

1268-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. L & S Drywall (Respondent).

Unit: “all carpenters, carpenters’ apprentices and drywall applicators in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1977] OLRB Rep. December).

1273-77-R: Christian Labour Association of Canada (Applicant) v. Jack W. Harper Construction Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1290-77-R: Ontario Public Service Employees Union (Applicant) v. Family and Children’s Services for the District of Timiskaming (Respondent).

Unit: “all employees of the Children’s Aid Society for the District of Timiskaming, save and except Supervisor, persons above the rank of Supervisor, Bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed in the school vacation period.” (13 employees in the unit).

1298-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Sahara Holdings Inc. (Respondent) v. Group of Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1299-77-R: Labourers’ International Union of North America, Local 493 (Applicant) v. Byers Construction Company Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener).

Unit: “all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1300-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pave-Al Limited (Respondent).

Unit: “all employees of the respondent working at 1250 Shawson Drive, Mississauga, Ontario, save and except foremen, dispatcher, scalemen, those above the rank of foreman, dispatcher and scaleman, office and sales staff, and those employees covered by existing collective agreements.” (9 employees in the unit). (*On agreement of the parties*).

1301-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. I.T.T. Aimco, A. Division of I.T.T. Industries of Canada Limited (Respondent).

Unit: "all office and clerical employees of the respondent in St. Catharines, Ontario, save and except supervisors and persons above the rank of supervisor, accounting supervisor, industrial engineer, sales co-ordinator, buyer and secretary to the Personnel Manager." (19 employees in the unit).

1315-77-R: Labourers' International Union of North America – Local 1036 (Applicant) v. George Stone & Sons Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

1327-77-R: Local Union 785, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Orlando Realty Corporation (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1328-77-R: Local Union 785 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Louis Donolo Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1338-77-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Vooreis Industries Canada (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1365-77-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Midwest Detroit Diesel Ltd. (Respondent).

Unit: "all employees of Midwest Detroit Diesel Ltd. in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office staff, persons employed on a cooperative work-study programme and students employed during school vacation periods.." (15 employees in the unit).

1368-77-R: United Garment Workers of America (Applicant) v. The Bell Shirt Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Belleville, save and except foreman and foreladies, those above the rank of foreman and forelady, office staff, sales staff, persons employed for not

more than twenty-four hours per week, and students employed during the school vacation period.” (47 employees in the unit).

1370-77-R: Christian Labour Association of Canada (Applicant) v. Frigid Insulation Limited (Respondent).

Unit: “all insulation mechanics and insulation mechanics’ apprentices in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor, Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

1380-77-R: Labourers’ International Union of North America (Applicant) v. Kosar Properties Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carlton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1381-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. The Georgian Group (Respondent).

Unit: “all construction labourers in the employ of the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1401-77-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Ernestown (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the Township of Ernestown, save and except chief administrator/clerk, treasurer, superintendent or roads, recreation director, pool supervisor, secretary to the chief administrator/clerk, foreman of the roads department, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

1402-77-R: Canadian Union of Public Employees (Applicant) v. Frontenac, Lennox and Addington County Roman Catholic Separate School Board (Respondent).

Unit #1: “all employees of the respondent employed as teacher aides, save and except those regularly employed for not more than 24 hours per week.” (6 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week as teacher-aides.” (3 employees in the unit). (*Dismissed*).

1408-77-R: Labourers’ International Union of North America – Local 1036 (Applicant) v. Pipe & Piling Supplies Ltd. (Respondent).

Unit: “all employees of the respondent in Sault Ste. Marie, save and except foremen and supervisors,

persons above the rank of foreman and supervisor and sales and office staff.” (5 employees in the unit). (*Having regard to the foregoing*). (*clarity note* – see Report of full decision [1977] OLRB Rep. December).

1426-77-R: Bakery and Confectionery Workers’ International Union of America Local 264 (Applicant) v. Sucronel Limited St. Lawrence Sugar Division (Respondent).

Unit: “all employees of the respondent in Don Mills, Ontario, save and except foremen, persons above the rank of foreman and office staff.” (10 employees in the unit).

Application Certified Subsequent to Pre-Hearing Vote

1159-77-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Freeport Hospital (Respondent).

Unit: “all employees of The Freeport Hospital at Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacist, graduate dietitians, student dietitians, technical personnel supervisors, persons above the rank of supervisor, office and clerical staff.” (60 employees in the unit). (*Having regard to the agreement of the parties*). –

Number of names of persons on revised voters’ list	60
Number of persons who cast ballots	48
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	15

Applications Certified Subsequent to Post-Hearing Vote

0888-77-R: Christián Labour Association of Canada (Applicant) v. Medi Park Lodges Inc. carrying on business as: Crescent Park Lodge (Respondent) v. Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C. (Intervener).

- and -

0962-77-R: Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C. (Applicant) v. Crescent Park Lodge (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit #1: “all employees of the respondent at its nursing home, Crescent Park Lodge, at Fort Erie, save and except Professional Medical Staff, Registered, Graduate and Undergraduate Nurses, Activity Director, Supervisors, persons above the rank of Supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (19 employees in the unit).

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	29
Ballots segregated and not counted	5
Number of ballots marked in favour of CLAC	20
Number of ballots marked in favour of SEIU Local 204	1
Number of ballots marked in favour of no trade union	3

(*Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted*).

1177-77-R: The Toronto Educational Assistants Association (Applicant) v. The Board of Education for the City of Toronto (Respondent).

Unit: "all Education Assistants employed by the Respondent in the City of Toronto, save and except supervisors, persons above the rank of supervisor, persons employed as Educational Assistant for not more than twenty-four (24) hours per week and persons employed as Educational Assistants for a definite term or task." (373 employees in the unit).

Number of names of persons on list as originally prepared by employer		330
Number of persons who cast ballots	189	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	178	
Number of ballots marked against applicant	10	

1188-77-R: London and District Service Workers' Union, Local 220 S.E.I.U. A.F.L. C.I.O. C.L.C. (Applicant) v. University Hospital owned and operated by London Health Association (Respondent).

Unit: "all employees of University Hospital regularly employed for not more than 24 hours a week in classifications covered by the subsisting collective agreement between the applicant union and respondent Hospital." (73 employees in the unit).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	63	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	48	
Number of ballots marked against applicant	14	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0643-77-R: Service Employees Union, Local 204 (Applicant) v. Oakwood Park Lodge (Respondent). (7 employees).

0647-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sheridan Management Associates (Respondent). (3 employees).

0725-77-R: United Plant Guard Workers of America Local 1962 (Applicant) v. Olympia & York Developments Limited (Respondent). (10 employees).

0758-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Charter-Global Developments Limited (Respondent). (12 employees).

0781-77-R: Christian Trade Unions of Canada (Applicant) v. Hamilton Trust and Savings Corporation (Respondent). (14 employees).

0981-77-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. S. Lombardo Electric Ltd. (Respondent). (10 employees).

1070-77-R: Mount Nemo Truckers Association (Applicant) v. 1. Canada Crushed Stone, A Division of Steetley Industries Limited, 2. A. Cupido Haulage, 3. Peter Bawtinheimer Limited, 4. K. F. Marshall Limited, 5. Benny Haulage Ltd. (Respondents) v. Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener). (20 employees).

1253-77-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. K-Mart Canada Limited (Respondent) v. Group of Employees (Objectors). (15 employees).

1320-77-R: Canadian Paperworkers Union (Applicant) v. Kleen-Stik Products Limited (Respondent) v. International Chemical Workers Union, Local 424 (Intervener). (85 employees).

1341-77-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. Albert Randall & Sons Limited (Respondent). (7 employees).

1395-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Massey-Ferguson Industries Limited (Respondent) v. International Union of Operating Engineers Local 796 (Intervener). (10 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1157-77-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Hastings (Respondent).

Voting Constituency: "All employees of the respondent employed at Hastings Centennial Manor Home for the Aged at Bancroft save and except professional medical staff, registered nurses, undergraduate nurses, housekeeper, persons above the rank of supervisor, office staff and students employed during the school vacation periods." (48 employees).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots		43
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	28	

Certification Dismissed Subsequent to Post-Hearing Vote

0948-77-R: International Ladies' Garment Workers' Union (Applicant) v. Mavis Vos Limited (Respondent).

Unit: "all employees of the respondent Mavis Vos Limited, in Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, supervisors, office and sales staff and students employed during the school vacation period." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	6	

0948-77-R: International Ladies' Garment Workers' Union (Applicant) v. William Frohman Sales Ltd. (Respondent).

Unit: "all employees of the respondent William Frohman Sales Ltd., in Metroplitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, supervisors, office and sales staff and students employed during the school vacation period." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	8	

0993-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Burlington Die Castings Co. Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Burlington, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period or as part of a co-operative training programme." (113 employees in the unit).

Number of names of persons on revised voters' list		105
Number of persons who cast ballots	95	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	45	
Number of ballots marked against applicant	48	

1143-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gazzola Paving Limited (Respondent).

Unit: "all employees of Gazzola Paving Limited, in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	13	

1166-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Rosedale Transport Limited (Respondent).

Unit: "all employees of the respondent working at Hamilton, Ontario, save and except dispatchers, those above the rank of dispatcher, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots		13
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	11	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1243-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sonotrol Systems Limited (Respondent). (2 employees).

1317-77-R: Labourers' International Union of North America, Local Union No. 597 (Applicant) v. Loaring Construction Company Limited (Respondent). (2 employees).

1346-77-R: Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Metal Recovery Industries Ltd. (Respondent). (20 employees).

1363-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nicholls-Radtke and Associates Ltd. (Respondent). (3 employees).

1372-77-R: Shantz Bros./ Big Bear Employees' Association (Applicant) v. Shantz Bros. Limited and Big Bear Services Ltd. (Respondents). (8 employees).

1418-77-R: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Oakwood Park Lodge (Respondent). (14 employees).

APPLICATION UNDER SECTION 1(4)

1406-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. W. N. Construction (Ottawa) Limited W. N. Holdings Limited (Respondent). (2 employees). (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0766-77-R: Isabell Dysart (Applicant) v. Northern Ontario & Quebec District Union of the Retail, Wholesale & Department Store Union AFL:CIO:CLC (Respondent) v. Acklands Limited (Timmins, Ont.) (Intervener). (*Granted*)

Unit #1: "all office and clerical employees of the intervener company at Timmins, Ontario, save and except office supervisor, persons above the rank of office supervisor, secretary to the Manager, outside or territorial salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	13	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	12	

Unit #2: "all employees of the intervener company at its warehouse at Timmins, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	6	
Numbers of ballots marked in favour of Respondent	3	
Number of ballots marked against Respondent	3	

1355-77-R: Weston D. Leeson, Donald G. Cooper, Staff Representatives (Local 663) (Applicants) v. Ontario Public Service Employees Union (Respondent). (20 employees). (*Dismissed*).

1366-77-R: Carl Wilson Industries Ltd. (Applicant) v. International Union of Electrical, Radio and Machine Workers and its Local 566 (Respondent). (7 employees). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1295-77-U: The New Gregory House Inc. (Applicant) v. International Beverage Dispensers' and Bertenders' Union, Local 280, of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C (Respondent). (*Dismissed*).

1428-77-U: Molson's Brewery (Ontario) Limited, Toronto Plant (Applicant) v. Keith Bobbitt, Ross Boyles, Gerald Burrows, Albert Carter, John Dietrich, Patrick Doyle, James Eakins, Fred Evans, John Gill, Nicholas Hamiuka, John Jursys, Cathal Kelly, John Logue, Stuart MacDonald, Joseph MacLean, Noel McVeigh, William Naylor, Frank Nutbean, Wasyl Petrasthuk, Robert Ross, B. Slevin, Dominic Sorbara, Patterson Terry, Louis Tierney and Basil Trainor (Respondents). (*Granted*).

1473-77-U: Foster Wheeler Ltd. (Applicant) v. E.J. Parisani, W.M. Reilly and G.A. Conaghan et al (See Schedule "A" attached hereto) (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1280-77-U: United Brotherhood of Carpenters and Joiners of America AFL-CIO, CLC, Local 2679 (Complainant) v. Innovative Wood Products (Respondent). (*Withdrawn*)

1286-77-U: United Brotherhood of Carpenters and Joiners of America AFL-CIO, CLC, Local 2679 (Applicant) v. Innovative Wood Products (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO PROSECUTE

1310-77-U: Retail Clerks Union, Local 486 (Chartered by the Retail Clerks International Association, (Applicant) v. Container Service – Division of Quinte Sanitation Services Limited (Quinte Sanitation Services Ltd.) (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1732-75-U: Andre Courteau (Complainant) v. The Built-up Roofers' Damp and Waterproofers' Section of the Sheet Metal Workers' International Association, Local Union No. 30 and Lorlea Steels Limited (Respondents). (*Dismissed*).

0635-76-U: United Steelworkers of America (Complainant) v. Argue Fuels, Division of Turbex Ltd. (Respondent). (*Terminated*).

0396-77-U: Service and Commercial Employees Union, Local 272, affiliated with Hotel and Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. The Ottawa Roman Catholic Separate School Board (Respondent). (*Withdrawn*)

0580-77-U: Teamsters Local Union No. 419 (Complainant) v. S.S. Kresge Company Limited (Respondent). (*Dismissed*).

0680-77-U: James Shanks (Complainant) v. C.U.P.E. Local #87 (Respondent) v. Corporation of the City of Thunder Bay (Intervener). (*Dismissed*).

0901-77-U: Local Union No. 173, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Kitchener Beverages Ltd. (Respondent). (*Dismissed*).

0947-77-U: Leo J. Strub (Complainant) v. The Association of the Professors of the University of Ottawa (A.P.U.O.) (Respondent). (*Dismissed*).

0969-77-U: International Brotherhood of Electrical Workers, Local Union 636 (Complainant) v. The Hydro Electric Commission of the City of Mississauga (Respondent). (*Granted*).

1008-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Sheridan Management Associates and Michael Feldman (Respondents). (*Granted*).

1048-77-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. The Becker Milk Company Limited (Respondent).

- and -

1049-77-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Ind-Ex Distributors Limited (Respondent). (*Granted*).

1285-77-U: Robert A. Gullins (Complainant) v. The International Officers of the International

Brotherhood of Electrical Workers and Local Union 353, International Brotherhood of Electrical Workers (Respondents). v. Electrical Contractors' Association of Toronto (Intervener). (*Withdrawn*).

1297-77-U: The Canadian Union of Public Employees and its Local 1742 (Complainant) v. Birchcliff Nursing Homes Limited carrying on business as Chatelaine Villa Nursing Home (Respondent). (*Withdrawn*).

1309-77-U: Canadian Union of Operating & General Workers (Complainant) v. Cadillac Fairview Corporation (Respondent). (*Withdrawn*).

1322-77-U: United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC (Complainant) v. Premium Forest Products Limited (A Division of Dragon Investments) (Respondent). (*Withdrawn*).

1347-77-U: Service Employees Union, Local 183 (Complainant) v. Lennox and Addington County General Hospital (Respondent). (*Withdrawn*).

1349-77-U: Michael McCue (Complainant) v. Local 1459 UAW (Respondent). (*Withdrawn*).

1391-77-U: Teamsters Union Local 938 (Complainant) v. Harkema Express Lines Limited (Respondent). (*Withdrawn*).

1399-77-U: Carmen Forgione (Complainant) v. Teamsters Union Local 938 (Respondent). (*Withdrawn*).

1403-77-U: Canadian Union of Public Employees, Local 101 (Complainant) v. The Corporation of the City of London (Respondent). (*Withdrawn*).

1404-77-U: Michael J. Racicot (Complainant) v. Teamsters Union Local 938 (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1303-77-M: Harvey's, a Division of Food Corporation Limited (Applicant) v. Canadian Union of Restaurant & Related Employee (Respondent). (*Granted*).

1307-77-M: Work Wear Corporation of Canada Ltd. (Applicant #1) v. Amalgamated Clothing Workers of America, CLC-AFL-CIO, Local 998 (Applicant #2). (*Granted*).

APPLICATION UNDER SECTION 55

0930-77-R: Toronto Motion Picture Projectionists Union, Local No. 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and

Canada (Applicant) v. Stinson Theatres (Barrie) Limited (Respondent) v. Famous Players Limited (Intervener). (*Granted*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0499-77-M: Canadian Union of Public Employees and its Local 1189 (Applicant) v. The Corporation of the City of Owen Sound (Respondent).

1047-77-M: Retail, Wholesale and Department Store Union and its Local 414 (Applicant) v. Provincial Fruit Company (Ottawa) Limited (Respondent). (*Withdrawn*).

1051-77-M: Canadian Union of Public Employees Local 139 (Applicant) v. North Civic Hospital (Respondent).

1321-77-M: London and District Service Workers' Union Local 220 Chartered by the Service Employee International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Waterloo County Separate School Board (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112A

1009-77-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Ace Construction (Division of Hockley Hills) (Respondent). (*Granted*).

1112-77-M: The Toronto Building and Construction Trades Council, and Labourers' International Union of North America, Local 506 (Applicants) v. Napev Construction Limited and General Contractors Section, Toronto Construction Association (Respondents). (*Granted*).

1277-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Eduard Phillips Ltd. and The Mechanical Contractors Association of Toronto (Respondent).

1278-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Globo Plumbing Ltd. and The Metropolitan Plumbing and Heating Contractors, Association, a Division of the Mechanical Contractors Association of Toronto (Respondents). (*Dismissed*).

1281-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Metropolitan Toronto Road Builders Association and its Affiliate Warren Bitulithic Ltd. (Respondent). (*Withdrawn*).

1283-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Metropolitan Toronto Sewer & Watermain Contractors Association and its affiliate Bandiera & Associates (Toronto) Ltd. (Respondent). (*Withdrawn*).

1375-77-M: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Metropolitan Toronto Residential Painting Contractors Association and Di Maria Painting & Decorating (Respondents). (*Withdrawn*).

1376-77-M: Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. The Ontario Painting Contractors Association and Three Bell Painters Limited (Respondents). (*Withdrawn*).

1377-77-M: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Metropolitan Toronto Residential Painting Contractors Association and Three Bell Painters Limited (Respondents). (*Withdrawn*).

1396-77-M: The Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Petrisan Construction Ltd. (Member Company of Toronto & District Excavators Association) (Respondent). (*Granted*).

1410-77-M: The Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Petrisan Construction Ltd. (Member Company of Toronto & District Excavators Association) (Respondent). (*Granted*).

1414-77-M: International Brotherhood of Painters & Allied Trades, Local 1919 Glaziers Division – Sault Ste Marie (Applicant) v. Watson's Glass Limited (Respondent). (*Withdrawn*).

1422-77-M: International Union of Elevator Constructors Local 50, Toronto (Applicant) v. Beckett Elevator Limited (Respondent). (*Withdrawn*).

1445-77-M: Labourers' International Union of North America, Local Union 183 (Applicant) v. Ontario Formwork Association (Respondent). (*Withdrawn*).

1446-77-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Matthews Group Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1110-77-M: Unifin Division KeepRite Products Ltd. (Employer) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Trade Union). (*Request Denied*).

1320-77-R: Canadian Paperworkers Union (Applicant) v. Kleen-Stik Products Limited (Respondent) v. International Chemical Workers Union, Local 424 (Intervener). (*Withdrawn*). (*Reconsideration*).



Labour
Relations Board

Ontario

Decisions February 78

2012

2

54



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
W. GIBSON
A. GRIBBEN
L. HEMSWORTH
A. HERSHKOVITZ
O. HODGES
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
H. SIMON
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYNLEY

Solicitor R.O. MACDOWELL

Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

CASES REPORTED

Base Electric Co. Ltd., Re International Brotherhood of Electrical Workers, Local Union 353 AND Electrical Contractors Association of Toronto, et al	140
Boart Hardmetals (Canada) Limited, Re International Union, United Automobile, Aerospace and Agricultural Implements Workers of America (U.A.W.) and its Local 1256, Frank Kenny, et al	150
Carleton University, Re Graduate Assistants' Association	184
Carleton University, Re Graduate Assistant's Association And Carleton University Support Staff Association	179
Champion Road Machinery Limited, Re International Association of Machinists & Aerospace Workers Local 1863	174
Druggist's Corporation Limited, Re Canadian Chemical Workers Union	169
Farrugia, John Re Ontario Public Service Employees Union, Local 240, James R. Allen and R. Alen Dalsto	152
Foster Wheeler Limited, Re Oscar Larocque And Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915	191
Haldimand-Norfolk Regional Health Unit, Re Ontario Nurses' Association	197
Innovative Wood Products, 358602 Ontario Limited operating as, Re United Brotherhood of Carpenters & Joiners of America, Local 2679	161
MacDonalds Consolidated Limited, Re Teamsters Local Union No. 419	167
Magna-Cote (Division of Magna International Inc.), Re International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - UAW	136
Municipality of Casimir, Jennings, Appleby, Re Laborers' International Union of North America, Local 493	130
Municipality of Metropolitan Toronto, The Re Stephen Gormley And Canadian Union of Public Employees, Toronto Civic Employees Local Union No. 43	143
Superior Sand, Gravel & Supplies Ltd., Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers	119
Trizec Equities Ltd., Re Trizec Equities Ltd. (Security Guards), And International Union, United Plant Guard Workers of America, Local 1962	189
United Parcel Service of Canada, Re Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141	172

INDEX OF CASES

- Certification – Bargaining unit – Whether teaching assistants and research assistants are employees – Whether separate bargaining units appropriate for graduate and undergraduate teaching assistants
- GRADUATE ASSISTANT'S ASSOCIATION v. CARLETON UNIVERSITY v. CARLETON UNIVERSITY SUPPORT STAFF ASSOCIATION 179
- Certification – Build up – Effect of projected build up being contingent upon obtaining future licences and approval from regulating authority
- TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 141 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA v. UNITED PARCEL SERVICE OF CANADA 172
- Certification – Employee – Whether employee who has not acted in a confidential capacity may be excluded because she might do so in the future
- CANADIAN CHEMICAL WORKERS UNION v. DRUGGIST'S CORPORATION LIMITED 169
- Certification – Employee – Whether owner-drivers are dependent contractors
- CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS v. SUPERIOR SAND, GRAVEL & SUPPLIES LTD 119
- Certification – Reconsideration – Interference with trade union – Effect of membership evidence being solicited by lame duck chief executive officer of municipal corporation – Whether bar to certification
- LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493 v. MUNICIPALITY OF CASIMIR, JENNINGS, APPLEBY 130
- Collective agreement – Strike – Whether following an A.I.B. rollback the parties must renegotiate their collective agreement and resort to conciliation before a strike becomes lawful
- BOART HARDMETALS (CANADA) LIMITED v. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENTS WORKERS OF AMERICA (U.A.W.) AND ITS LOCAL 1256, FRANK KENNY et al 150
- Duty of Fair Representation – Effect of trade union initiating grievance concerning a contract interpretation which would adversely affect an employee in the unit
- JOHN FARRUGIA v. ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 240, JAMES M. ALLEN AND R. ALLEN DALSTO 152
- Duty of Fair Representation – Whether an employee is entitled to specific notice that his grievance will be discussed at a particular meeting – Effect of failure of employee to request notice or indicate his desire to make submissions

STEPHEN GORMLEY v. CANADIAN UNION OF PUBLIC EMPLOYEES, TORONTO CIVIC EMPLOYEES LOCAL UNION NO. 43 and THE MUNICIPALITY OF METROPOLITAN TORONTO	143
Duty of Fair Representation – Whether union conduct respecting employee layoff and administration of hiring hall is arbitrary, discriminatory or in bad faith	
OSCAR LAROCQUE v. OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 915 and FOSTER WHEELER LIMITED	191
Lockout – Effect of employer disciplining employees who had previously engaged in an unlawful strike – Whether a lockout	
TEAMSTERS LOCAL UNION NO. 419, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA v. MacDONALDS CONSOLIDATED LIMITED	167
Membership Evidence – Practice – Procedure – Whether Board will entertain allegation of managerial involvement in organizing campaign in the absence of prior notice of intention to raise this issue	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW v. MAGNACOTE (DIVISION OF MAGNA INTERNATIONAL INC.)	136
Reference – Employee – Whether employees have power to make effective recommendation – Whether employees have independent decision making power	
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS LOCAL 1863 v. CHAMPION ROAD MACHINERY LIMITED	174
Reference – Whether Minister has authority to appoint an interest arbitrator when procedure adopted does not comply with section 34c	
HALDIMAND-NORFOLK REGIONAL HEALTH UNIT v. ONTARIO NURSES' ASSOCIATION	197
S. 79 – S. 61 – Whether union intimidation or coercion – Effect of membership evidence	
UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 2679 v. 358602 ONTARIO LIMITED OPERATING AS INNOVATIVE WOOD PRODUCTS	161
S. 79 – Whether decision to alter working conditions must be communicated to employees prior to the onset of the section 70 freeze – Whether change of working conditions	
GRADUATE ASSISTANTS' ASSOCIATION v. CARLETON UNIVERSITY	184
Sale of Business – Effect of the division of a company into a number of parts which afterwards carry on independently	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 353 v. ELECTRICAL CONTRACTORS ASSOCIATION OF TORONTO, TRON ELECTRIC CO., BASE ELECTRIC CO. LTD. et al	140

Termination – Whether trade union has failed to exercise its bargaining rights – Effect of Board discretion

TRIZEC EQUITIES LTD. (SECURITY GUARDS) v. INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 1962 v. TRIZEC EQUITIES LTD

1308-76-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. **Superior Sand, Gravel & Supplies Ltd.**, (Respondent).

Certification – Employee – Whether owner-drivers are dependent contractors.

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and F.W. Murray.

APPEARANCES: *E.G. Posen for the applicant; S.C. Bernardo and M. Roberts for the respondent.*

DECISION OF D.D. CARTER, CHAIRMAN, AND BOARD MEMBER M.J. FENWICK; February 8, 1978.

1. This is an application for certification of a bargaining unit described as “all drivers employed by, or under contract to, the respondent at Maple, Ontario, who provide their own vehicles for the purposes of the job”. The parties agreed that this description was intended to refer to the owner-drivers of vehicles who delivered to the respondent’s customers the materials extracted at its quarry.

2. The status of these owner-drivers under the *Labour Relations Act* was raised as a preliminary matter, requiring a determination as to whether these persons are “dependent contractors” under the Act, or whether they are independent businessmen, falling outside of the statutory collective bargaining structure. At a later stage in these proceedings, counsel for the respondent advanced the argument that, even if we found these persons to be dependent contractors, we should not give effect to those provisions of the *Labour Relations Act* dealing with dependent contractors because they fall outside the legislative competence of the Province, being in direct conflict with the federal *Combines Investigation Act*. We will return to these two legal issues after reviewing the nature of the work performed by these persons, and the relationship of these persons to the respondent company.

3. A group of nine owner-drivers by agreement of the parties was treated as being representative of the entire group for whom the applicant sought bargaining rights. With one exception, these owner-drivers spent most of their working time delivering materials extracted at the respondent’s quarry, supplying their own services and the use of the vehicles which they owned. The work entailed receiving a load at the quarry, delivering the load to the destination designated by the respondent’s dispatcher, collecting the payment for the load, if delivered on a C.O.D. basis, and remitting that payment to the respondent. This work was assigned to the owner-drivers on a “first-come, first-served” basis and, when business was slack, this method of work assignment entailed a considerable wait for the owner-drivers.

4. The nine owner-drivers, to an extent that varied among them, performed haulage services for other persons during the same period that they were working for the respondent. All but one of these persons, however, obtained a very substantial portion of their remuneration from the respondent. The one exception derived only about twenty-five per cent of his income from the respondent, most of the remainder coming from another quarry

operation. As for the other owner-drivers, eighty to ninety per cent of their remuneration was derived from the respondent company. The owner-drivers' total annual remuneration from all sources before taking into account the expenses of owning and operating the vehicle did not in any case exceed \$27,000 and, in one case, went as low as \$15,000.

5. The outside remuneration of the eight owner-drivers related to either snow removal work, or to the resale of quarry supplies to others. This latter type of arrangement involved the purchase of quarry supplies from the respondent company, except when they were unavailable, and resale of these supplies to certain purchasers, usually retail building supply companies. The owner-driver would buy material from the respondent at the same price as paid by the respondent's other customers and then charge a higher price to his own customer, the difference apparently reflecting the price of the haulage services rendered. This activity, however, did not account for more than twenty per cent of the remuneration of any of the owner-drivers examined.

6. The evidence established that the nine owner-drivers supplied only their own services to the respondent, and that the work was not performed by any person employed by them. One of the nine, however, testified that his brother drove his truck occasionally, being paid a percentage of the amount he was paid for this work. Apparently, the brother drove the truck during the period of time when the witness was having difficulty obtaining insurance because of his driving record. The witness testified, however, that only his own services were supplied to the respondent.

7. The owner-drivers were responsible for the purchase, licensing, operation, and maintenance of the dump trucks used to perform the work. The financing of the purchase of his truck was arranged by the owner-driver with no assistance from the respondent; the P.C.V. licence was acquired by the owner-driver in his own name; the vehicle was identified as belonging to the owner-driver; insurance, fuel, and repairs all were paid for by the owner-driver. The expenses of operating the truck, moreover, were deducted from the gross income received by the owner-drivers for the purpose of calculating their income tax.

8. The relationship between the owner-drivers and the respondent was defined to some extent in a formal document titled, "Haulage Agreement". The agreement was a standard form agreement, supplied by the respondent, and one that all owner-drivers were required to sign as a condition of obtaining work from the respondent. The agreement read as follows:

**SUPERIOR SAND, GRAVEL & SUPPLIES LIMITED
HAULAGE AGREEMENT**

DATE:

TRUCK OWNER

ADDRESS

PHONE

OPERATED BY ADDRESS

TYPE OF TRUCK MODEL
 LICENSED CAPACITY
 LICENCE NO P.C.V. NO
 INSURER POLICY NO

 P.L. & P.D. LIMITS (Not less than \$100,000.00)
 EXPIRES:

The above named Hauler hereby agrees with Superior Sand, Gravel & Supplies Limited, to haul its material to all delivery points as scheduled by Superior's dispatcher.

Payment shall be made by Superior to the Hauler bi-monthly on the 15th, and last days of each and every month, and such payments shall at all times be one half month in arrears. If the day for payment falls on a Saturday, Sunday or holiday, it shall be due on the next following business day.

Haulage rates payable shall be those charged to customers as revised from time to time, less a deduction of 4% of the total haulage made by Superior to cover the costs of credit, handling, billing and dispatching.

The Hauler agrees to abide by the rules and regulations of Superior regarding parking, dispatch, speed of vehicles in pit area, dumping and clean-up of vehicles and to report for hauling each morning unless the dispatcher has been notified of intended absence prior to 9 a.m.

Signed

9. The owner-drivers were remunerated on a per-load basis, the amount of remuneration varying according to the distance travelled and, to some extent, the weight of the load. The respondent, in consultation with a committee of owner-drivers had established different geographic zones, and a per-ton rate for each zone. Distance appeared to be the primary factor in determining the amount paid for each load carried, since the evidence indicated that the owner-drivers were paid for a minimum load, regardless of whether the actual load might be less. The time taken to deliver the load was definitely not a factor in determining remuneration paid by the respondent, as there was no payment for time spent at the quarry waiting for a load or for any delays that the owner-driver might encounter in delivering the load. If a delay was occasioned by a customer, it was possible for the owner-drivers on their own initiative to charge the customer for waiting time. As a practical matter, however, without the support of the respondent, the collection of such charges was almost impossible.

10. Payment to the owner-drivers was by cheque, twice a month. In order to be paid for their work the drivers were required to submit to the respondent a daily summary of their deliveries, and, attached to it, copies of the invoices signed by the customers who had

received the deliveries. The summary sheets and invoices were forms supplied by the respondent.

11. The bi-monthly payments took into account the respondent's service charge of four per cent of the amount earned in haulage fees by the owner-driver. According to the terms of the formal agreement, this charge was to cover the costs of credit, handling, billing and dispatching. Also deducted were any amounts owing by the owner-drivers to the respondent for gas purchased at the quarry. No other deductions were made from the bi-monthly payments to the owner-drivers. The payment of any income tax, unemployment insurance premiums, workmen's compensation premiums, medical and hospital insurance premiums was the sole responsibility of the owner-drivers.

12. The degree of control exercised by the respondent over the owner-drivers requires some examination. Under the agreement, the owner-drivers had agreed to haul the respondent's material to all delivery points designated by the dispatcher. There were a few occasions when an owner-driver would refuse to take a load to a delivery point. On most of these occasions, the respondent simply assigned the load to another owner-driver, but at times a person refusing a load would not be given any more work for the balance of the day. On the other hand, the evidence indicated that the respondent did not take exception to an owner-driver refusing to take a load because he wished to deliver his own load, purchased from the respondent and being delivered to his customer for resale.

13. The evidence also indicated that the relationship between the respondent and the owner-drivers was sufficiently stable so that the owner-drivers were expected to notify the respondent if they were not going to report for work. The agreement itself required the owner-drivers to report for hauling each morning unless the dispatcher had been notified of intended absence prior to 9 a.m. In the absence of paid vacations and holidays, very few days off were taken by the owner-drivers, and these were usually taken when the quarry was not busy. The actual number of hours worked in a day by the owner-drivers tended to coincide with the hours of operation of the quarry, probably the result of the work being assigned on the basis of first-come first-served. Outside work, such as snow removal, was usually performed when there was no work available at the quarry.

14. One witness was called by the respondent, and it was agreed by the parties that this person was representative of those persons who, as independent contractors, fell outside the statutory definition of dependent contractor. This person owned two trucks, one primarily operated by himself and the other operated by a son who was paid a wage. In addition, spare drivers were employed to cover holidays. The payments of wages to these drivers was administered by a bookkeeper hired by the witness. This witness reported that he grossed approximately \$52,000 a year, less than half of this income being derived from the respondent. Apparently, the witness relied upon another quarry for the greater part of this gross income and, as well, derived a small amount of income from another quarry and snow haulage work at Greenwood and Woodbine racetracks. The income derived from the respondent, however, was calculated and paid in the same manner as to the other witnesses, and it is clear that this witness operated under the same working rules as the others.

15. The *Labour Relations Act*, Section 1(1)(ga), defines a dependent contractor in the following terms:

“(ga)“Dependent contractor” means a person whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;”

A dependent contractor is included within the term “employee” by operation of section 1(1)(gb), with the result that dependent contractors, as a general rule, are treated under the Act in the same manner as employees. The one exception to this general legislative approach is found in section 6(4), where dependent contractors are given the choice between a bargaining unit of only dependent contractors or a mixed unit of dependent contractors and other employees. Section 6(4) provides:

“(4) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.”

16. These dependent contractor provisions, according to counsel for the respondent, should be considered as falling outside the legislative competence of the Province of Ontario. His argument was that the existence of such provisions in a provincial collective bargaining statute was incompatible with the present federal combines law. The Board, therefore, must render these provisions inoperative, because of the doctrine of federal paramountcy.

17. This is not the first time that this argument has been made to the Board. In *Indusmin Ltd.*, Board File 1374-76-R, the Board made it clear that it could not perform the function of a Superior Court by determining whether the provincial Legislature had acted beyond the legislative competence conferred upon it by the *British North America Act*. The assumption that must be made by a statutory tribunal such as this Board is that the Legislature intended that the statute should not extend beyond areas of provincial jurisdiction. Such an approach does not mean that the Board pays no regard to the constitutional implications of its decisions. When the Board is faced with particular fact situations, it is careful not to apply the *Labour Relations Act* in a manner that would extend it beyond the areas of provincial jurisdiction. See, for example, *Four B Manufacturing Limited*, [1976] OLRB Rep. Dec. 765. The Board assumes that the Legislature did not intend it to act beyond provincial jurisdiction and applies the statute accordingly. The application of this presumption of statutory interpretation is a much different function than the determination by the Board that certain parts of its own statute are constitutionally inoperative. This latter exercise, in our view, is one that can only be performed by the Superior Courts.

18. The dependent contractor provisions, however, have been considered by the Board in the light of the federal *Combines Investigation Act*. As the Board stated in *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197:

"17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*."

Again, recognizing that collective bargaining legislation should not be used to sanction the kind of business combinations prohibited by the *Combines Investigation Act*, the Board, in *Canada Crushed Stone*, File No. 1070-77-R, stated:

"17. An application of the indicia laid down in the *Nelson Crushed Stone* case [[1977] OLRB Rep. Feb. 104] is not necessarily determinative of whether a contractor is a "dependent contractor" within the meaning of The *Labour Relations Act*. In a highly industrialized oligopolistic economy there are countless contractors who are economically dependent but because of the "total character of their business", cannot avail themselves of the *Labour Relations Act* as a means of improving their bargaining strength. One need only look at the automotive parts industry where numerous suppliers work under contracts which place them in a position of economic dependence within the indicia laid down in *Nelson Crushed Stone*. These contractors or suppliers, however, are employers in their own right often employing into the hundreds. No one would suggest that the *Labour Relations Act* be extended to allow such contractors to band together and bargain collectively under the Act. The *Labour Relations Act*, which is designed to create and maintain a division between employees on the one side, and employers on the other, cannot be read as extending to this type of dependent contractor. In addition to considering economic dependency, therefore, the Board must also consider the "total character of the business" in deciding whether a contractor more closely resembles an employee or an independent contractor in his relationship with the em-

ployer. The employment of others is a factor which helps to define the "total character of the business." Is it a factor, however, which in and of itself colours the character of the business so as to remove its owner from the ambit of section 1(ga) of the Act?"

19. In cases such as this one the Board must distinguish the workman from the true entrepreneur. The task is not an easy one since there exists no clear line of demarcation. Determining who falls within the Act as a dependent contractor is essentially a factual exercise. The legal test, found in section 1(1)(ga) of the Act provides the Board with only a point of reference but, as the Board has already noted in *Adbo Contracting Ltd., supra*, it is a more useful and less confusing reference point than those adopted by the Board prior to the enactment of the dependent contractor provisions. This new point of reference leads the Board directly to the substance of the economic relationship, and away from those matters of form which merely obscure its reality. While it may be quite true that the Board might reach the very same result by recourse to the old points of reference, this new test provides a more direct and understandable route to the ultimate result.

20. The type of economic dependence and the kind of business relationship existing in any given case are the primary indicators of whether a person is a dependent contractor. These indicators must be applied in a comparative manner, the fundamental question always being whether the person's relationship with another more closely resembles the relationship of an employee than that of an independent contractor. The result of this exercise, of course, depends largely upon the facts brought before the Board in any particular case. In all cases, however, the Board is mindful that it should not extend the protections of the *Labour Relations Act* to the true entrepreneur.

21. The above considerations lead us in this case to conclude that we should not deal directly with the constitutional arguments as presented by counsel for the respondent. The proper approach, in our view, is to deal with the issue of whether the owner-drivers are dependent contractors as defined by the Act, presuming that the Legislature did not intend to extend the *Labour Relations Act* to areas beyond its legislative competence. Our interpretation and application of the dependent contractor provisions, therefore, will reflect our concern that the true business entrepreneur, or independent contractor, should not be included within the concept of a dependent contractor.

22. The arguments of counsel as to the status of the owner-drivers each attempted to relate the economic relationship existing in this case to the most favourable benchmark available. Counsel for the applicant used as his benchmark the relationship dealt with by the Board in the *Indusmin* case, *supra*, and which the Board found to be that of the dependent contractor. According to counsel, the differences between that case and the instant one, such as the existence of a formal contractual arrangement, the absence of seniority arrangement governing the assignment of loads, and the greater extent of earnings derived from sources other than the respondent, were not sufficiently significant to permit the Board to draw a different conclusion. On the other hand, counsel for the respondent used as his benchmark the one witness agreed by the parties to be an independent contractor, arguing that the other owner-drivers who worked under the same arrangement had the very same opportunity to exercise entrepreneurial skills, and should be treated as such by the Board.

23. Both arguments, in our view, tend to obscure the considerations that the Board

must take into account when determining whether a person is a dependent contractor. As we have already noted in the *Adbo* case, *supra*, there is a shaded area on the spectrum of economic relationships where it is difficult to determine whether a person is functioning as a workman or an independent contractor. The Board, however, is required to draw a line through that shaded area when determining the extent of the coverage of the *Labour Relations Act*. When drawing this line, the Board can gain only limited assistance from benchmarks that also lie within that shaded area, such as the ones suggested by counsel. Differences between situations within the shaded area, although perhaps appearing small, can be significant, given that such situations themselves lie very close to the line. More visible benchmarks, therefore, should be used by the Board if the line is to be drawn with any accuracy.

24. Our task is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the types of economic dependence and the kind of business relationship, or obligation, that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than that of an independent contractor.

25. There is no doubt that in this case there exists a form of economic dependence. The respondent was the source of a large percentage of the work performed by the representative owner-drivers. Admittedly, the rather loose arrangement between the respondent and the owner-drivers permitted some outside work to be performed by the owner-drivers, but this usually occurred when work was not available from the respondent or when the work involved hauling material sold by the respondent to the owner-drivers. The outside work, therefore, did not conflict directly with the work performed for the respondent, and can be compared to the "moonlighting" often engaged in by employees.

26. To a very large extent the owner-drivers, like employees, did not themselves create their own work opportunities but, rather, relied upon the work opportunities created by another person, in this case the respondent. It is clear that the customers who sought delivery of the respondent's materials looked to the respondent to perform these services, and not to the owner-drivers. Work opportunities, therefore, flowed from the respondent.

27. The manner in which the owner-drivers were remunerated by the respondent also points to this type of economic dependence. The respondent would charge the customer an amount reflecting not only the cost of the materials, but also the cost of the haulage. The owner-driver was paid by the respondent regardless of whether the respondent was able to collect from the customer. The risk of non-collection clearly rested with the respondent rather than the owner-drivers.

28. The source and manner of remuneration, in our view, tend to point to a type of economic dependence more closely resembling that of the employee. The evidence, taking into account the type and extent of the outside activities of the owner-drivers, indicate that the owner-drivers were not providing service to a number of customers but were primarily dependent upon the respondent for their livelihood. Given this type of economic depend-

ence, even the one owner-driver who derived only twenty-five per cent of his income from the respondent does not appear to be unlike a casual employee.

29. Some comment, however, has to be made concerning the position of the respondent's one witness. This person derived almost half of his remuneration from the respondent, and yet it was agreed that this person was not a dependent contractor. Although it could be argued that there exists in this situation a type of economic dependence not much different than that of the other owner-drivers, one distinction should be emphasized – by owning and employing two vehicles, this person was not necessarily tied to one job at any particular time as were the other owner-drivers. Thus, unlike the employee, this person could perform services for two different persons concurrently.

30. The kind of business arrangement, or obligation to perform duties, existing between the owner-drivers and the respondent, is a factor that now must be considered. At least some part of that arrangement was set out in the formal haulage agreement between the respondent and the owner-driver. The fact that this agreement did not assume the form of a contract of employment is not a factor to which the Board can give much weight, since the Act clearly provides that the existence of a contract of employment need not be a precondition for status as a dependent contractor. Nor does the presence of a written agreement by itself give the Board much assistance in determining the issue. Although a written agreement may in some cases reveal the substance of the business arrangement, as the Board indicated in *Indusmin, supra*, it can also serve to obscure the substance of that arrangement.

31. The final two clauses in the haulage agreement do serve to underline a very important aspect of the arrangement between the respondent and the owner-drivers – these persons were furnishing to the respondent only their own labour and their vehicle. The organizational structure was that of the respondent, such matters as credit, handling, billing, dispatching, and the organization of work within the quarry being handled by the respondent. In this respect, the position of the owner-drivers was not unlike that of employees under an obligation to provide their own labour and the tools of their trade to an employer. Although the owner-drivers were charged for this structure, the charge was dictated by the standard form agreement that the owner-drivers were required to sign as a condition of obtaining work from the respondent. Its existence cannot disguise the fact that the owner-drivers were furnishing only their own labour and their vehicle and that the respondent was in the business of not only producing and selling quarry materials, but also of delivering those materials.

32. The fact that the nine owner-drivers furnished to the respondent their labour alone should be emphasized. Their position is to be contrasted with the respondent's one witness who employed others to perform the work. As the Board stated in *Canada Crushed Stone, supra*: “[t]he qualitative destination or the difference in kind, is between the owner-operator, who, in addition to his own labour, uses and attempts to profit from the labour of others”. There are two reasons why the employment of others is a key consideration.

33. First, the employment of others, in substance and not just in form, appears much more associated with entrepreneurial activity than with the duties performed by an employee. Where a person employs others, it has to be said that the person is supplying more than just his own labour and the tools of his trade. A good illustration is the relationship between

the respondent and its one witness. That person had organized himself so that he could supply the respondent with not only his own labour and a truck, but also the labour of someone else and a second vehicle. At this point the person, having organized his affairs as an employer and having invested in more than just his own tools of the trade, begins to assume the appearance of an entrepreneur.

34. A second consideration is that this kind of person, as an employer, does not fit comfortably within the Act as a dependent contractor. The Act, although it recognizes that employers may organize into an employer's organization, does not permit employers to organize under the guise of employees and form themselves into trade unions. [For a fuller discussion of this aspect of the problem, see *Canada Crushed Stone, supra*.] The employment of others, therefore, is sufficient to place a person beyond the reach of the dependent contractor provisions of the Act.

35. The looseness of the arrangements under which the owner-drivers operated does not alter the essential nature of their obligation to perform services. Although it is clear that they were controlled much more by the availability of work than by any supervisory control exercised by the respondent, the fact is that they did show up when needed by the respondent and that they usually complied with the work assignments made by the respondent. While it is possible, as argued by counsel for the respondent, that these arrangements might permit the owner-drivers to provide services to the respondent in an entrepreneurial manner, the actual facts before the Board indicate that their services did not assume this form. We regard our task as determining what these persons now are, and not what they might have become.

36. In this case, having regard to all of the above considerations, we have reached the conclusion that the persons for whom the applicant seeks collective bargaining rights are in a position of economic dependence upon, and under an obligation to perform duties for, the respondent more closely resembling the relationship of an employee than an independent contractor. These persons are dependent contractors within the meaning of the *Labour Relations Act*, and entitled to the statutory protections conferred upon them by that statute.

37. This matter will be continued, at a date to be set by the Registrar, in order to hear representations as to the appropriate bargaining unit.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. I would have found that the subject owner-drivers were "independent contractors" and accordingly, not being "dependent contractors" within the meaning of sections 1(ga) and 1(gb) of the Act, I would have dismissed the application.

3. From all of the evidence in this case, I would have concluded that there is a lesser degree of control by the respondent over the contractors, both with respect to the manner in which the work is done and the quantum of work or time spent on the respondent's work than that exercised by the respondent in the *Indusmin* case (see Board File No. 1374-76-R). Therefore, for the same reasons I express in dissenting from the Board's decision in that case (see para. 19 of *Indusmin* dissenting opinion), I would have found the contractors to be independent.

4. There was, however, in the evidence, several important additional ingredients that would, in my opinion, cause the Board to find that this group of contractors should be found to be independent for purposes of the *Ontario Labour Relations Act*.

5. Specifically, with respect to the control exercised by the respondent over the contractor, the evidence disclosed that only once did a contractor fail to get a load for the balance of the day when he refused a load. It is reasonable to assume that in that instance the load offered to him was to him unattractive for some reason and that his fellow contractors would insist on such action, for otherwise there would be fewer contractors to share the unattractive loads in the future if refusals of this nature were ignored and allowed to become commonplace. From the evidence, we certainly cannot conclude that the respondent alone was responsible for the imposition of this temporary restriction.

6. The respondent's role in these matters is quite clear, as no exception is taken with the contractors, who, having reported at the company's premises, chose to take loads purchased from the respondent for resale to a customer of the contractor.

7. It is also clear from the evidence that the respondent does not expect the contractor to report regularly for work at their premises and takes no exception to a contractor who regularly does work for other companies.

8. One such owner-operator who is by the Board's decision included in the bargaining unit only derives 25% of his income from the respondent. I would not agree that this contractor's relationship should be characterized only as being comparable with that of a casual employee. Surely the fact that 75% of his earnings are derived from other haulage work clearly indicates that, while his employment with the respondent itself may be casual, his relationship with the respondent is clearly entrepreneurial and that he is able to hold himself out to, and does work for, other enterprises requiring his services.

9. The applicant and the respondent both agreed that Mr. Price should, along with others who owned and operated more than one truck, be excluded from this application as they were independent contractors. The evidence is not clear how many other contractors owned and operated more than one truck, but it is clear that they all work, including the witness mentioned in para. 8 above, under identical working rules and compensation arrangements as does the entire group of contractors who are subject of this decision.

10. It is therefore quite clear from the evidence that all owner-operators are free to work for other organizations and that the respondent does not in any way try to control either the order in which the work is done or the quantum of work, i.e., time spent rendering services for the respondent. The fact that some of the contractors at a given point in time did not regularly avail themselves of this opportunity should not cause the Board to consider that except for those who are themselves employers all other contractors should be considered to be "in a position of economic dependence upon, and under an obligation to perform duties for" the respondent.

11. I do not believe it is necessary to dwell on the results of this decision, other than to say if there was no conflict before, beyond the normal competitive element existing between truck operators, as a result of the Board's decision a new dimension will be introduced into the competitive roles which may in the long run eliminate several important competitive elements.

12. The Highway Transport Board presumably issues P.C.V. licences having regard for public necessity and convenience, but in so doing, in the public interest, it is charged under the *Public Commercial Vehicles Act* with maintaining a healthy competition. It seems to me that this decision is in direct conflict with these broad purposes and can only serve in several ways to restrict competition.

1730-76-R Laborers' International Union of North America, Local 493, (Applicant), v. **Municipality of Casimir, Jennings, Appleby**, (Respondent).

Certification – Reconsideration – Interference with Trade Union – Effect of membership evidence being solicited by lame duck chief executive officer of municipal corporation – Whether bar to certification.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and R. D. Rutherford.

APPEARANCES: *A. M. Minsky and M. A. Ross for the applicant; K. R. Valin and T. C. K. Carroll for the respondent.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER R. D. RUTHERFORD: February 8, 1978.

1. In a decision dated January 25, 1977, the Board certified the applicant as bargaining agent for a group of employees of the respondent. The respondent made an application to the Board dated February 28, 1977, requesting the Board to reconsider the above-mentioned decision and to revoke the certificate on the grounds that it was issued contrary to the provisions of section 12 of the Act. In a further decision dated March 17, 1977, the Board denied the request for reconsideration.

2. The respondent moved before the Divisional Court for an Order quashing or setting aside the certificate dated January 25th, 1977 issued by the Board to the applicant, for an Order quashing or setting aside the decision of the Board dated March 17th, 1977, and for an Order requiring the Board to reconsider its decision dated January 25th, 1977.

3. The motion was dismissed with costs to the union on the understanding that the Municipality, with the agreement of the respondents to the motion, would apply for a hearing on reconsideration.

4. The Board accordingly set a date for a hearing for the purpose of affording the respondent an opportunity to show cause as to why the Board should reconsider its decision in this matter of January 25th, 1977 and, if the Board should so decide, to hear the evidence and representations of the parties with respect to all matters incidental to the application for certification.

5. There are other applications before the Board to which certain of the evidence

and argument heard in the present case, particularly with respect to reconsideration, have significant relevance. Having that in mind, the Board believes it to be in the best interests of the parties to confine itself, in the present case, to stating that on reviewing all of the evidence and considering the submissions of the parties, it finds the circumstances surrounding the original application for certification to be such as to persuade it to grant the request to reconsider the original decision and to hear the evidence and argument offered by the applicant and the respondent with respect thereto.

6. There is no dispute that the membership evidence filed on behalf of the applicant union was obtained solely through the efforts of Mr. Ray Beuparlant who, at the time, was Reeve of the respondent municipality.

7. Evidence was heard from Royal Lafleur, one of the employees who were interviewed by Beuparlant on December 16, 1976. He said that Beuparlant called the employees into the office of the municipal garage one by one. Lafleur was the last of the employees to be called in. He testified that Beuparlant showed him a union card and said that if Lafleur signed it, he, Beuparlant would require \$1.00. The meeting lasted about five minutes during which Beuparlant told Lafleur he was trying to organize the employees to get better wages and conditions in the future and job security. Lafleur, whose father-in-law is the newly-elected Reeve, Armand Brisson, and whose father is a Councilman, declined to sign a card. He said there was no attempt made by Beuparlant to pressure him into signing.

8. Richard Gauthier, an employee of the Municipality in the arena, also met with Beuparlant at the arena on December 16th. He said the meeting concerned the matter of whether or not he wanted to sign a union card. He said that Beuparlant showed him a card and he signed it and gave Beuparlant \$1.00. Gauthier stated that Beuparlant was Reeve at the time, but that he was aware that he had been defeated at the election of December 6th. Gauthier said that there was no discussion about wages or conditions or job security and that Beuparlant just asked him if he wanted to join a union. He added, however, that he signed a card "on account of security". He was not threatened in any way.

9. Beuparlant said that he asked the men to sign union cards because he believed their jobs were at stake. He also said, however, that when David Grey, whom he identified as an executive of Local 493, came over to him and asked him to sign up the employees, he agreed to do so. The initiative for the organizational drive, therefore, came not from Beuparlant, but from the union which, according to Beuparlant himself, then recruited him as its organizer.

10. Beuparlant testified that he asked the employees if they were interested in joining the union. He said they told him they were and that he did not have to bring up to them the question of protecting their jobs, although that was his stated motivation. He said that the employees brought it up and it was talked back and forth. He testified that he did not tell the employees that they had to sign cards but discussed the problem of insecurity. He said that he was not acting as Reeve when interviewing and signing the men and that the men knew that he had been defeated in the election.

11. Through Beuparlant's efforts, seven employees signed applications for membership in the applicant union and paid to Mr. Beuparlant the sum of \$1.00 each. Mr. Beau-

parlant signed receipts for the fees he received. The transactions took place on or about December 16, 1976.

12. It was on the basis of this membership evidence and the Form 8 filed by M. A. Ross, Business Manager for the applicant, that the Board issued the certificate dated January 25, 1977 which the respondent now challenges.

13. The respondent, as previously indicated, bases its case upon the provisions of section 12 of the Act which provides as follows:

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

14. The respondent argues that Mr. Beauparlant was the Reeve and Chief Executive Officer of the respondent municipality at the time that he interviewed and obtained membership cards from the employees concerned and that because of his office, the prohibitions of section 12 were applicable to the application and the certificate, therefore, ought not to have been issued by the Board.

15. There is agreement that Mr. Beauparlant had been defeated in the municipal elections of December 6, 1976 but that his term continued to run until December 31, 1976. On December 16th, Mr. Beauparlant was thus a so-called "lame duck" or caretaker reeve whose powers, along with those of the Council, were circumscribed by the provisions of the Municipal Act. The respondent argued, however, that notwithstanding the fact that Beauparlant had been defeated in the election, he was still the head of the Council and the Chief Executive Officer of the corporation on December 16th when he organized the employees on behalf of the applicant.

16. The primary question before the Board is whether Beauparlant was an employer within the meaning of section 12 of The Labour Relations Act at the time that he participated in the organizational campaign.

17. The Municipal Act, R.S.O. 1970, c. 284, in section 209(1) declares that the reeve of a village or township is the head of the council and the chief executive officer of the corporation.

18. Section 210 of the same enactment sets out the duties of the head of council as follows:

210. It is the duty of the head of the council,

- (a) to be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed;
- (b) to oversee the conduct of all subordinate officers in the government of it and, as far as practicable, cause all negligence, carelessness and violation of duty to be prosecuted and punished; and

- (c) to communicate to the council from time to time such information and recommend to it such measures as may tend to the improvement of the finances, health, security, cleanliness, comfort and ornament of the municipality.

Subsequent subsections of the Municipal Act, namely, sections 214, 215 and 218, reflect the meaning to be attached to the term "subordinate officers in the government" in that they refer to the Chief Administrative Officer, the Clerk and the Treasurer.

19. Section 352 of the Municipal Act sets out the by-laws which may be passed by Councils of all Municipalities. Subsection 63 of section 352 deals with the appointment of "such officers and servants as may be necessary for the purposes of the corporation, or for carrying into effect the provisions of any Act of the Legislature or by-law of the council, and for fixing their remuneration and prescribing their duties...".

20. Subsection 64 of the same section deals with the power of Councils to pass by-laws with respect to pensions of "employees or any class thereof". It contains a definition of "employee" in sub-clause (a)(i) wherein it is stated that "employee" means any salaried officer, clerk, workman, servant or other person in the employ of the municipality, etc. etc.

21. The same definition applies to employees referred to in by-laws dealing with sick leave credit gratuities, insurance and hospitalization.

22. The definition of "employees" in the foregoing sections obviously distinguishes between salaried officers on the one hand and clerks, workmen, servants and other persons in the employ of the municipality for the purposes therein dealt with.

23. It is apparent, therefore, that the duty of the Reeve referred to in section 210 above is confined to those employees called officers and does not extend to other employees as defined in the sections referred to above.

24. Not only does that appear to be the case under the law, but the evidence in the present case is quite clear that, in the respondent municipality, all hiring and firing of employees is done by by-law enacted by the Council. It is equally clear on the evidence that no by-law has been enacted by the Council with respect to the union nor has there been any by-law passed with a view to authorizing Reeve Beauparlant to take any action on behalf of the municipality with respect to the employees and the union. It is thus clear that at the time of the organization of the union, Beauparlant was not, in any sense, the employer of the employees concerned, nor could it in any way be said that his actions were those of the Council of the Municipality. It is also clear upon the evidence that the Council of the Municipality did not participate in the formation or administration of the trade union, nor did it contribute financial or other support to the trade union.

25. The fact is that Beauparlant was not exercising any official function nor carrying out any direction of the Municipality in dealing with the union and the employees. On the contrary, it is quite obvious that Beauparlant was acting independently of his office and, indeed, in the interests of the employees, rather than those of the Municipality. This is a situation which must have occurred to the employees during their conversations with Beauparlant with respect to securing their jobs and enhancing their wages through the assistance of

the union, having in mind at the same time that he had been defeated in the election. It is to be observed that none of the employees concerned raised any objections in the various proceedings which arose out of the original application.

26. In the result, we find that there is nothing in the evidence that establishes the commission of any of the acts referred to in section 12 which would prohibit the Board from issuing a certificate to the applicant.

27. A further aspect of the case raised by the respondent at the hearing before this panel relates to the acceptability of the membership evidence, having regard to the circumstances under which it was obtained. In this respect, the respondent referred the Board to paragraph 13 of the *Millwork and Building Supplies Company Limited* case, [1968] OLRB Rep. June 273. In that case, the respondent employer charged that one of its foremen assisted the union in its organizing campaign contrary to sections 10 and 48 of the Act as they then were. Paragraph 13 of the decision reads as follows:

The third situation with which the Board has dealt is the case where the foreman has actually organized the employees on behalf of the union by causing the employees to sign cards in his presence and by acting as the union agent in collecting the initiation fee. Such extensive and direct involvement has been treated by the Board as having deprived the employees of the exercise of their freedom of choice. The membership evidence in such case has not been given effect to by the Board (see *McCarthy Milling Company Limited* Case, 54 C.L.L.C. ¶17,070, and *Swift Canadian Co., Limited* Case, 54 C.L.L.C. ¶17,071).

28. Paragraph 14 of that same case is not without interest in these proceedings, since the applicant made reference to the *Air Liquide* case cited in that paragraph. Paragraph 14 reads as follows:

The fourth instance of foreman participation in a union's organizing campaign is the case where the foreman speaks in favour of a union in a situation where no other union is competing for the employees' membership and the foreman's support of the union is in a form which employees can readily recognize as being contrary to the wishes of the company. If the foreman has acted in a manner where no coercion takes place and his activities are recognized as being in support of the employees' efforts to place themselves in a stronger position with respect to the employer in order to attempt to better themselves, or if he aligns himself with the employees' interests against what the employees are likely to believe to be the employer's position with respect to the union, it cannot be said that the foreman has represented the employer by his activities. Neither can it be said that the employees were unduly influenced by the foreman's support because of the foreman's position in the management structure. Where the evidence establishes that the employees are not likely to treat the foreman's activities as activities of the employer, or such activities are readily recognizable as being contrary to the wishes of the employer, it cannot be said that the membership evidence obtained at the behest of proper union organizers has

been cast in doubt by the foreman's activities. In this regard, we adopt the reasoning contained in the *Air Liquide* decision, 64 C.L.L.C. ¶16,002.

29. It might be noted that in the *Millwork* case (*supra*), the certificate was granted on the Board's finding that the evidence did not support the charge.

30. We might add that it has long been the practice of the Board not to give effect to membership evidence which a member of management has signed up (see *McCarthy Milling Company Limited*, 54 CLLC ¶17,070; *Swift Canadian Co. Limited*, 54 CLLC ¶17,071; *Acme Ruler Company Limited*, [1969] OLRB Rep. Nov. 952).

31. It is hardly necessary to observe that in the present case we are not dealing with the question of managerial powers within a business or industry, areas to which the above precedents relate, but to the powers of an elected officer of a municipality, concerning which there appears to be no Board precedents. In addition, the officer in question, as we have several times observed, was, at the material times, one who had been defeated at the polls and, furthermore, who was therefore, together with the Council of the Municipality, restricted by the provisions of section 244(1) of the Municipal Act, which provides:

244.-(1) The council of a local municipality shall not, after the day the poll is held for the election of the new council, or, where all members of council are elected by acclamation, after the day the candidates are declared elected under section 50, pass any by-law, except a by-law with respect to an undertaking, work, project, scheme, act, matter or thing that has been approved by the Municipal Board, or resolution for, or that involves, directly or indirectly, the payment of money other than that provided in the estimates for the current year, or enter into any contract or obligation on the part of the corporation, or appoint to or dismiss from any office any officer under the control of the council, or do any other corporate act, except in case of extreme urgency, or unless the act is one that the council is required by law to do or is one that the council is authorized to do by a resolution or by-law passed before the day the poll is held or the day the members of council are declared elected under section 50, as the case may be.

32. The Board, having reviewed the jurisprudence relating to managerial support and interference with the organization of trade unions in business and industry, and having related the principles set out therein to the facts and circumstances of the present case, finds that the membership evidence obtained by Beauparlant, who could not be said to have been, at the relevant time, a person who possessed the power to affect the employment status of any of the employees with whom he dealt, cannot be said to be adversely affected by the hand of management.

33. The Board accordingly re-affirms the decision of the Board dated January 25, 1977, in which a certificate was issued to the applicant union.

DECISION OF BOARD MEMBER, J. D. BELL:

1. I dissent.

2. Mr. Beauparlant, although defeated at the polls on December 6th, 1976, continued as the Reeve, i.e. the head of the council and chief executive officer of the corporation, until December 31st, 1976.
3. It may be that the ultimate decision to hire or fire an individual employee rests with the council and is enacted by by-law. However, one cannot ignore the fact that the Reeve is not only a member of the council, but is its head.
4. The employee witnesses who appeared before the Board were aware that Beauparlant had been defeated at the polls a few days before he asked them to sign membership cards; but they were also aware that he was still the Reeve.
5. Furthermore, his conduct in going to the garage, taking over the office, and calling the employees in one at a time to sign union cards reflects the image of a person in authority, not that of the usual union organizer.
6. In my opinion, Beauparlant's defeat at the polls on December 6th does not alter his responsibility or status until the end of his term, December 31st, 1976. In my opinion, the restrictions referred to in section 244(1) of the Municipal Act are precautions to discourage abuse by a defeated council while still expecting it to function in a responsible manner.
7. I would conclude that Reeve Beauparlant used his position and privilege as head of the council and chief executive officer of the corporation to obtain the membership evidence submitted in support of this application.
8. I would revoke the certificate issued to the applicant union by the decision dated January 25th, 1977.

1595-77-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, (Applicant), v. Magna-Cote (Division of Magna International Inc.), (Respondent).

Membership Evidence – Practice – Procedure – Whether Board will entertain allegation of managerial involvement in organizing campaign in the absence of prior notice of intention to raise this issue.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members F.W. Murray and P.J. O'Keeffe.

APPEARANCES: *B. Chercover, Howard Powers and Carl Anderson for the applicant; D.W. Brady and Ludwig Perchthold for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER P.J. O'KEEFFE: February 23, 1978.

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. The Board further finds that all employees of Magna-Cote (Division of Magna International Inc.) in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: The term technical staff refers to laboratory technicians and chemists.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 30, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under Section 7(1) of the said Act.

5. Having determined the appropriate bargaining unit and announced the membership position of the applicant, counsel for the respondent stated that he wished to bring to the attention of the Board two "facts" which he considered to be material to the application. The applicant was not put on notice that these "facts" would be put before the Board. The respondent informed the Board that:

- (1) The union's organizing campaign was headed by Mr. R. Demoe who was at all material times a management foreman and excluded from the bargaining unit.
- (2) The potential bargaining unit group is made up largely of immigrant females who cannot read or write English.

Counsel for the employer argued that when these two "facts" are considered together the voluntariness of the membership evidence is called into question. He cited the *Veres Wire Industry Ltd.* case, [1976] OLRB Rep. July 337 and *Metal Textile of Canada* case, [1971] OLRB Rep. Nov. 694 in support of his argument. He asked the Board to conduct an investigation as it would in a non-pay non-sign situation and call evidence to satisfy itself as to the bona fides of the membership evidence. In the alternative, counsel stated that the respondent was prepared to call evidence to establish the "facts" referred to above.

6. The "facts" which counsel for the respondent put before the Board in this matter are allegations which, if proven, may or may not, depending upon the other facts which are relevant to the Board's consideration, cause the Board to make a finding that the union has violated Section 61 of the Act or that it has submitted membership evidence which does not meet the test of voluntariness. These allegations were not made prior to the hearing although Counsel for the respondent admitted that the company was aware of these "facts" as of January 10, 1978. Counsel was retained prior to January 30, 1978. The hearing was held on February 6, 1978. Rule 47 of the Board's Rules of Procedure stipulates:

"47. (1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision."

The Board has long recognized that delays in the certification process occasioned by the late filing of allegations or by untimely objections often result in the undermining of employee rights to collective representation as provided for in the Act. The dynamic character of labour relations and the prejudice worked by unnecessary and undue delay have also been recognized by the courts (see re *Hotel and Restaurant Employees v. Nick Massey Hotels Ltd. et al* 70 CLLC 14,020 at p. 101 per Laskin J.A. as he then was). Bearing these considerations in mind it is the practice of the Board not to allow allegations to be made at the hearing which could have been made in advance thereby obviating the need for adjournment and delay. (See re *Fleck Manufacturing Limited* case, 62 CLLC 1064, *Gignac, Sutts, Nosanchuk* [1973] OLRB Rep. August. 438; *Seaway Apparel Ltd.* [1967] OLRB Rep. May. 146, *American Optical Company Canada Limited*, [1968] OLRB Rep. Sept. 602, *Burlington Hotel Company Limited*, [1969] OLRB Rep. November 970, *Nation-Wide Interior Maintenance Co. Ltd.* [1972] OLRB Rep. January 86 and *General Crane Industries Limited*, [1975] January 39.) The allegations raised by the respondent in this matter under the guise of "facts" are untimely and accordingly, the Board hereby exercises its authority under Rule 47 and refuses to entertain them at this juncture.

7. In the *Veres Wire* case (supra) the Board described the dilemma which faces an employer upon discovery that a person he considers to be managerial is assisting the union in its organizing campaign. The Board concluded that rather than directing the person to cease his efforts on behalf of the union, which may result in a finding that the employer violated the Act, the employer should remain neutral. The Board stated at paragraph 7:

"In our view the only posture that an employer may realistically assume in the face of the dilemma delineated is to remain aloof and neutral."

Counsel for the respondent cited this passage in defence of the respondent's failure to act. The passage cited from the *Veres Wire* case (supra) cautions the employer in respect of direct intervention or self-help which may lead to charges under the Act. The passage must be read as directing the employer to deal with the situation through the properly constituted channels. The employer is expected to bring the matter to the attention of the Board. It must do so promptly, however, if it expects the matter to be heard. The employer cannot wait until the hearing to notify the Board and the trade union of his suspicions when he has known for some time in advance of the hearing.

8. Counsel for the respondent likened the allegations which he placed before the Board to allegations of "non-sign or non-pay" which can be made at any time and in response to which the Board will conduct an investigation and if a prima facie case is established put the matter on for hearing and assume carriage of the proceedings. The non-sign and non-pay allegations involve an assertion that the membership evidence does not meet the statutory requirements set out in section 1(j)(i) and 1(j)(ii) of the Act. These allegations in contrast involves the assertion that, although the evidence does meet these statutory requirements it should nevertheless be rejected because either the employees did not understand the character and contents of the documents which they were signing or alternatively, their signing was not a voluntary expression of their desire for trade union representation. The allegations made by the respondent in this case are clearly distinguishable from allegations of "non-sign, non-pay" and cannot be characterized as such.

9. In the "non-pay, non-sign" situation an allegation is made which, if proven to be true, may constitute a direct fraud on the Board by virtue of the fact that the person who has signed the Form 8 has attested to the truth of a statement which he knows not to be true or of which he has no knowledge or by virtue of the fact that a membership card signed by someone other than the person whose name appears on it has been submitted. Para. 3 of the Form 8 reads:

"(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:"

Even if proven to be true, the allegation made by the respondent in this case would not constitute a direct fraud on the Board by virtue of the Form 8 attestation or by virtue of a membership card having been signed by someone other than the person whose name appears on it. These are allegations which, if timely, must be proven by the person who alleges.

10. An allegation of non-sign, non-pay also brings to the fore the question of trade union membership. The secrecy of union membership is protected by section 100(1) of the Act. If the Board were to allow the party making the allegation to call the person whom it alleges did not sign or did not pay, it would be fostering a procedure which would undermine the protection afforded by Section 100(1) in response to what may be an unfounded allegation. The Board, therefore, responding to the statutory preservation of membership secrecy carries out its own investigation in order to determine if there is a prima facie case. It is only after satisfying itself that there is a prima facie case of "non-sign, non-pay" that the Board calls the person whom it is alleged did not sign or did not pay the required \$1 to give evidence. It is only after satisfying itself that there exists a "prima facie" case that the Board permits the secrecy protected by Section 100(1) of the Act to be broken.

11. The Board's practice and procedure in respect of an alleged "non-sign, non-pay", therefore, flows from both the nature of the offence, a possible direct fraud against the Board, and the duty of the Board to take whatever steps are necessary to preserve the secrecy of trade union membership. Neither of these factors apply in the instant case. The "facts" which counsel for the respondent has put before the Board are allegations (distinct and apart from allegations of "non-sign, non-pay") which must be filed promptly if they are to be heard. The Board has found that they were not filed promptly as required and having regard to the prejudice of delay and to the requirements of Rule 47, it is the decision of the Board not to entertain evidence in respect of these allegations.

12. Accordingly, the Board hereby certifies the applicant for the unit of employees described in para. 3 herein on the basis of its findings with respect to the membership evidence as set out in para. 4 herein. A certificate will issue to the applicant.

13. The Board hereby records that it announced at the hearing that printed signatures were shown on 9 of the membership cards.

DECISION OF BOARD MEMBER F.W. MURRAY:

I dissent. My reasons therefor will be given at a later date.

1134-77-M 1170-77-R International Brotherhood of Electrical Workers Local Union 353, (Applicant), v. Electrical Contractors Association of Toronto, Tron Electric Co., **Base Electric Co. Ltd.**, Flag Electric Co. Ltd., Weston Electric Ltd., Code Electric Co. Ltd., Virgo Electric Ltd., (Respondents)

Sale of a Business – Effect of the division of a company into a number of parts which afterwards carry on independently

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members R. D. Joyce and O. Hodges.

APPEARANCES: *Paul Schmelter and W. Jackes for the applicant; J. P. Wilson, M. G. Mitchnick, Tullio Cerasuolo, Guido Cerasuolo, Gildo Cerasuolo and Vincenzo Cerasuolo for the respondents.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; February 9, 1978.

1. The Board directs that the above applications be and the same are hereby consolidated.

2. This is an application brought under sections 55, 1(4) and 112a of The Labour Relations Act. The applicant alleges that a sale of a business has transpired between Base Electric Limited (hereinafter referred to as "Base") on the one hand, and Virgo Electric

Limited (hereinafter referred to as “Virgo”), Flag Electric Limited (hereinafter referred to as “Flag”), Weston Electric Limited (hereinafter referred to as “Weston”), and Code Electric Limited (hereinafter referred to as “Code”) on the other hand. Further, or in the alternative, it alleges that the four last-named companies are under common control and direction; and in either case or in both cases, the four last-named companies are bound by the collective agreement between the applicant and Base Electric Limited.

3. A brief history of the matters giving rise to this application begins over ten years ago when Tron Electric was formed. Tron Electric was a partnership formed by three brothers – Tullio, Gildo and Guido Cerasuolo. Tron Electric carried on the business of an electrical contractor in and around the Municipality of Metropolitan Toronto. Tron Electric had a collective agreement with the applicant as far back as 1969 and it actively carried on business until 1974.

4. Sometime in May 1973, the three brothers in Tron Electric, together with their brother, Vincenzo Cerasuolo, formed Base and were the major shareholders therein with their wives being nominal shareholders. Base and the applicant entered into a collective agreement in November 1976. Prior to this, the brothers had decided to go their separate ways, so Tullio Cerasuolo formed Virgo in April 1976, and Guido and Gildo Cerasuolo formed Flag, with Vincenzo Cerasuolo being employed by Flag. The brothers attempted to operate Virgo and Flag and keep Base in operation to finish off work in progress, etc. This became too difficult so, in the fall of 1976, they agreed to abandon their separate ventures and reactivate Base.

5. Base continued in active operation until early 1977 (its last contract was entered into on February 7, 1977). Early in 1977, the brothers decided that they would no longer do business together as Base. As a result, Tullio Cerasuolo re-activated Virgo, Gildo Cerasuolo formed Weston, Guido Cerasuolo re-activated Flag on his own, and Vincenzo Cerasuolo formed Code. That is the present corporate arrangement. Each of the four new companies carries on the business of electrical contractors in and around the Municipality of Metropolitan Toronto. Base carried on the business of an electrical contractor in and around the Municipality of Metropolitan Toronto.

6. The physical assets of Base were purchased by the four new companies, pursuant to an arrangement worked out by Mrs. D. Wheeler, the former bookkeeper for Base. Excluding the four brothers, only Weston and Flag employ former Base employees. The four new companies each have separate head offices, but contribute equally to the rent of the Base head office where Mrs. Wheeler works. Mrs. Wheeler is employed by each of the four new companies. Base is still in existence because there are receivables to collect and there is potential liability for warranty work. When the four brothers left Base to form their separate companies, whatever work Base had in progress, and whatever warranty work might arise, was contracted out to the four new companies. None of the four new companies has considered itself bound by the collective agreement between the applicant and Base.

7. This summarizes the material facts as they were presented to this Board. There was no evidence before the Board that would support any conclusion that the break-up of Base was motivated by anything other than a desire of the four brothers to stop doing business together. Even though the evidence is clear that they each continue to employ the same bookkeeper and use the former office of Base to some degree, there is no evidence of common control, ownership, etc. within the meaning of section 1(4) of the Act.

8. By agreement of the parties, and in order to prevent the hearing from dragging out for an unreasonable length of time, the Board will deal only with Virgo in the remainder of the decision. Evidence was heard primarily concerning Base and Virgo alone at the hearing and the parties agreed that they would attempt to resolve the situation as it related to the other companies, based upon the Board's decision in Virgo.

9. Counsel for Virgo argued that there was no sale of a business within the meaning of section 55 because all of the advantages of Base were given up by the brothers when they decided to go their separate ways. He urged on the Board that section 55 had two purposes only; to catch sham transactions set up to avoid the union, and to allow the collective agreement to follow where there had been a transfer of a business as a going concern. In support of this he cited *Aircraft Metal Specialists*, [1970] OLRB Rep. Sept. 702.

10. In examining whether or not a sale of a business has taken place, the Board has often emphasized that it will examine the totality of the transaction and not emphasize the legal form of the transaction. In *Culverhouse Foods Limited and Culverhouse Foods Inc.*, [1976] OLRB Rep. Nov. 691, the Board sets out the principle which would be considered when deciding whether or not there was a sale of a business under the section. At page 697 it stated:

“In each case the decisive question is whether or not there is a continuation of the business The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction.”

It then went on to list several factors which would assist in the determination of this question, such as the transfer of the goodwill, assets, receivables, inventory, etc., and the continued employment of former employees by the successor and the nature of the work being performed by them *inter alia*. The Board then went on to say:

“No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.”

11. In the instant case, Base was, and Virgo is, an electrical contractor performing the work of an electrical contractor in and around the same Municipality. There was nothing to suggest that there is any difference in the sort of work performed by the two companies. Virgo purchased some of the assets of Base; in particular, Virgo purchased, *inter alia*, the tools and truck used by Tullio Cerasuolo while he was associated with Base. Mr. Cerasuolo's association with Base was not one simply of employee/employer; he was one of the major shareholders of Base, along with his three brothers. Even though no goodwill was transferred, each of the major shareholders were actively engaged in the electrical contracting business through Base, and it would stand to reason that the reputation enjoyed by Base

would attach to the four principals in some measure. Therefore, Virgo would, as a practical matter, necessarily share in the reputation of Base through the agency of Tullio Cerasuolo, who was actively associated with each as an owner.

12. It would seem from the above that Virgo is actively carrying on a part of the business formerly carried on by Base and that this is the result of the sale of part of the business of Base to Virgo within the meaning of section 55 of the Act. Therefore, Virgo is bound by the collective agreement entered into between Base and the union.

13. As a consequence of this, Virgo must abide by the terms of the collective agreement. From the evidence, it would seem that Virgo has not been filing welfare reports with the union or conforming to the conditions of employment contained in section 6 of the collective agreement. Virgo must henceforth abide by the terms of the agreement, and the Board will remain seized of the matter in relation to the question of compensation for breach of the agreement in the event that the parties are unable to reach agreement on this point.

14. The decision of Board Member R. D. Joyce will follow.

1367-77-U Stephen Gormley, (Complainant), v. Canadian Union of Public Employees, Toronto Civic Employees Local Union No. 43 and The Municipality of Metropolitan Toronto, (Respondents).

Duty of Fair Representation – Whether an employee is entitled to specific notice that his grievance will be discussed at a particular meeting – Effect of failure of employee to request notice or indicate his desire to make submissions

BEFORE: Pamela C. Picher, Vice-Chairman.

APPEARANCES: *Stephen Gormley for the complainant; H. Goldblatt, E. Haggan, M. Harper, Al. Sims, Derek Brown, David Clough, Wadid Salib and P. Leo Schmidt for the respondents.*

DECISION OF THE BOARD; February 10, 1978.

1. The name: "The Canadian Union of Public Employees, Toronto Civic Employees Local Union No. 43" appearing in the style of cause as the name of one of the respondents is amended to read: "Canadian Union of Public Employees, Toronto Civic Employees Local Union No. 43".

2. This is a complaint filed under section 79 of The Labour Relations Act. The grievor, Stephen Gormley, complains that he has been dealt with by the respondent union (hereinafter referred to as Local 43) contrary to the provisions of section 60 of the Act which imposes a duty of fair representation on the union.

3. The general concern underlying this grievance is Mr. Gormley's objection to a practice approved by both his union and management. To fill temporary vacancies in management positions, the respondent company has developed the procedure of temporarily promoting a person from the bargaining unit into a management position without either the union or management requiring that the promoted individual temporarily forfeit his union membership. Mr. Gormley complains that this practice creates a conflict of interest which undermines the union. He poses the situation of a promoted union officer, pointing out that the officer would be put in the position of being responsible, at one and the same time, for representing the interests of management and carrying out his union duties. Mr. Gormley complains that the practice further runs counter to the interests of employees because the temporary nature of the promotion keeps them in an unstable position and makes them vulnerable to management threats of being put "back in the ranks".

4. Mr. Haggan, President of Local 43, contends that the practice of temporarily promoting union members into management positions is highly beneficial to employees. He is not particularly disturbed about employees maintaining their union membership or even officers retaining their offices. The union previously considered a proposed by-law amendment to require union officers to resign from their positions if appointed to a management position but it was turned down in the form in which it was presented to the membership. The union does not at this time, therefore, have a by-law to deal with the problem raised by Mr. Gormley. Mr. Haggan is concerned that it would severely jeopardize employee interests if union members were prohibited from being promoted into managerial positions simply because the union does not have a by-law which eliminates any possible conflict of interest. If management were forced to use non-bargaining unit people to fill temporary management vacancies, union employees would, in his view, be deprived of an opportunity to train and gain experience which would greatly assist them in ultimately obtaining permanent management positions.

5. The specific incident giving rise to this complaint took place on or about June 1, 1977 when Mr. John Wolf was promoted out of his bargaining unit position of sludge incinerator operator to replace Mr. Walsh in his management position of chief operator of the main treatment plant. Immediately following the promotion of Mr. Wolf, Mr. Gormley filed a grievance which stated simply, "Violation of Collective Agreement".

6. From step one there was much confusion among both union and management people as to the precise nature of Mr. Gormley's complaint. Initially, Mr. Gormley limited his complaint to the allegation that promoting union people into management positions was a violation of the collective agreement. Mr. Earl Fanning, his shop steward, however, presented the grievance at step one as a complaint that the senior most qualified person had not been given the temporary promotion. The Board is satisfied that the union made every reasonable effort to clarify the nature of the grievance including taking the unusual step of inviting Mr. Gormley to attend the step three meeting on August 26, 1977. Mr. Haggan also attended the step three grievance procedure although this was not his usual practice.

7. The evidence shows that by the end of the step three meeting, the parties had agreed that the grievance contained two issues: firstly, the primary issue in the grievance concerning the appointment of bargaining unit people to management positions and secondly, a new, more minor complaint introduced for the first time at this meeting that Mr. Gormley should have been given the bargaining unit position left by Mr. Wolf as sludge incinerator operator when he moved up to fill Mr. Walsh's management position.

8. Mr. Gormley has no complaints concerning the union's processing of his grievance up through step three of the grievance procedure. His complaint, emanates in part, however, from his belief that during the step three discussions Mr. Haggan said that he was going to take the case to arbitration. Mr. Haggan strongly denies that at the step three meeting he indicated a decision to take the case to arbitration. Mr. M. Harper, the business agent, Mr. Schmidt, from management, and Mr. Fanning each testified that they could not recall such a statement.

9. Mr. Harper, as business agent, was responsible for making a recommendation on the grievance to the general membership, the body charged with the final responsibility for deciding whether or not a grievance should proceed to arbitration. Following the step three meeting, he contacted the union lawyers and regional director for their opinions on the case. With respect to the first aspect of the grievance, i.e., the general question of promotions out of the bargaining unit, Mr. Harper reached the conclusion that the complaint was not a violation of the collective agreement. He viewed it as an internal union matter with which the members would have to deal through an alteration of the by-laws. As for the new complaint concerning the position of sludge incinerator operator, Mr. Harper concluded that although this aspect of the grievance might constitute a violation of the collective agreement, Mr. Gormley would have to go back to step one to pursue it since the matter had first surfaced at step three. Mr. Harper's recommendation to the general membership, therefore, was that the grievance be split, i.e., that the first aspect of the grievance be dropped and that the second part be remitted to step one.

10. The matter came before the general membership on September 13, 1977. Mr. Gormley did not attend the meeting because on September 9th he had left for a three-week vacation in Ireland. It is undisputed that Mr. Gormley did not advise Mr. Haggan, Mr. Harper or Mr. Sims, the other business agent, of his intended absence nor did he make a request to have the discussion of his grievance delayed until the first general meeting following his return.

11. Mr. Gormley's complaint about the September membership meeting is that the union should not have decided to drop his grievance in his absence and that the President, who knew how important the grievance was to him, should have acted to delay a decision on the grievance until he had returned three weeks hence. Mr. Gormley further complains that his grievance was not fairly discussed at the general membership meeting in that Mr. Sims indicated that a delay would cause a problem with time limits. In Mr. Gormley's assessment, the company has always maintained a flexible stance on time limits.

12. At the outset of the discussion of Mr. Gormley's grievance a motion was made to delay the discussion until Mr. Gormley returned from vacation. Mr. Harper testified that pursuant to this motion he was asked by the membership where Mr. Gormley was and when he would be back. Apparently no one knew when Mr. Gormley would return. Mr. Gormley argues that they should have realized that he wouldn't have been away for more than three weeks. The question was raised by a member as to why this grievance should be held up when the union doesn't hold up other grievances when people are away. In the end, the motion was defeated and the membership turned to a debate of the merits of the grievance.

13. Mr. Sims objected to splitting the grievance and stated his opinion that because of a problem of time limits the union should either proceed all the way with the dual grievance

ance or drop the whole thing. Mr. Sims then expressed to the membership his opinion that the matter should not proceed to arbitration at all because if the primary aspect of the grievance regarding the promotion of bargaining unit people into management positions was successful, it would harm the membership by jeopardizing their chances for promotion. Mr. Sims further offered the membership his opinion that this aspect of the grievance did not amount to a violation of the collective agreement.

14. Mr. Haggan testified that at the meeting he also gave his opinion that the grievance should not proceed to arbitration for the reason that it would destroy the future of promotions for bargaining unit employees and would, therefore, bring an injustice upon the members. Mr. Haggan admitted that at the time he was not absolutely convinced that the grievance would not succeed at arbitration but felt the welfare of the members should be given priority.

15. Mr. Harper testified that he tried to play the devil's advocate at the meeting. He explained to the members precisely how Mr. Gormley thought the practice of promoting union people into management jobs while retaining their union membership could lead to a conflict of interest and undermine the union. He explained as well that Mr. Gormley felt that if the temporary position went on too long it could deny the employee an opportunity for a permanent promotion. Mr. Harper stated at the hearing that he personally agreed with Mr. Gormley's complaint but felt that the membership had to agree on an alteration of the by-laws before the present practice should be stopped. With respect to Mr. Sims' comments on the time limits, Mr. Harper said that he did not oppose the statement because he did not know when Mr. Gormley was coming back and because he believed that the reason the union had never had a problem with time limits was because they had only asked for extensions for reasonable cause. He felt there would have been reasonable cause if Mr. Gormley had specifically asked the membership not to proceed in his absence but could not, in these circumstances, justify requesting an extension.

16. When Mr. Gormley returned from his vacation he was advised of the decision of the general membership and was told to contact the union if he had any questions. Mr. Gormley made no contact. He attended the next general membership meeting but said nothing when the minutes of the previous meeting were read indicating that his grievance had been dropped. Mr. Gormley explained that he thought there was no use raising an objection to the minutes because he felt he would have been ruled out of order since he could not raise an objection relating to "omissions, corrections or errors".

17. The duty of fair representation imposed on the union through section 60 of The Labour Relations Act is as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

18. Over the years many of the aspects of the union's duty of fair representation have settled into place. The Board has repeatedly held that in order not to act in an arbitrary

manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles. Additionally, a union is prohibited from processing a grievance in bad faith. An employee must not become the victim of the union's ill will such that a dislike for an individual dictates the path of the grievance rather than the merits of the grievance or legitimate concerns for the welfare of the bargaining unit and bargaining process. The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for doing so. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

19. Mr. Gormley alleges that the union officials in this case acted arbitrarily because by proceeding with his grievance at a general membership meeting at which he was not present, they ignored the merits of his grievance and refused to allow him to have any input into the general membership meeting. Mr. Gormley further alleges that he was the subject of the union's bad faith and discrimination. He contends that President Haggan and Business Agent Sims were opposed to his grievance from the start and seized upon the opportunity of his absence from the general membership meeting to dispose of the problem by encouraging the membership to vote in favour of dropping the grievance. Mr. Gormley alleges that if it had been any other grievance the matter would have been held over until the grievor's return. In summarizing his situation, Mr. Gormley said, "I was in a poker game with a marked deck of cards and there was no way I could win; justice couldn't prevail".

20. On the basis of all the evidence, the Board is satisfied that Mr. Gormley's grievance was not processed by the union in an arbitrary manner. Mr. Haggan, Mr. Sims and Mr. Harper made every effort to clarify the issues in Mr. Gormley's grievance. The business agents made a special visit to Mr. Gormley to have him write out precisely how he felt aggrieved. In recommending to the general membership that the policy aspect of Mr. Gormley's grievance be dropped, Mr. Harper sought outside advice and finally concluded that Mr. Gormley's basic allegation was not a violation of the collective agreement. The Board is further satisfied that before voting to drop the grievance, the membership participated in a full discussion of the merits of the grievance.

21. With respect to Mr. Gormley's allegation of bad faith, the Board is satisfied that neither Mr. Haggan, Mr. Harper, Mr. Sims nor the general membership acted with any hostility towards Mr. Gormley. Although Mr. Haggan and Mr. Sims stated in unequivocal terms that they disagreed with Mr. Gormley's grievance from the outset, the Board is satisfied that their disagreement was rooted in an evaluation of the merits of the grievance and the welfare of the majority of the members rather than in any hostility towards Mr. Gormley. The Board believed Mr. Haggan when he said that he would never seek to deny any brother the right to a different opinion or the right to grieve.

22. There is absolutely no evidence that anyone tried to railroad the grievance through in Mr. Gormley's absence. Mr. Harper, who expressed some agreement with Mr. Gormley's basic complaint, acted as the devil's advocate at the membership meeting setting forth Mr. Gormley's arguments as to how the procedure of promoting bargaining unit people into management positions could undermine the union and jeopardize the possibility of permanent promotions. As well, after the general membership meeting, Mr. Gormley was invited to contact the union if he had any questions about the disposition of his grievance.

23. Turning to the last allegation of discrimination, the nub of Mr. Gormley's complaint is that the union discriminated against him by proceeding in his absence at the general membership meeting. The evidence discloses, however, that if nothing is said by a grievor ahead of time and he is not at the meeting, the union has a practice of proceeding with a resolution of the grievance in his absence. At the hearing Mr. Haggan testified that given the number of grievances processed by Local 43 annually, chaos would develop if the union had to delay dealing with grievances whenever an individual was away unless the grievor had specifically indicated his desire to be present. In view of the fact that Mr. Gormley never advised anyone that he was going to go away and made no effort to ensure that his grievance would not be discussed in his absence, the Board can hardly find that the union discriminated against him by proceeding in its usual fashion with his grievance. Furthermore, the evidence shows that over at least the past twenty-three years the union has never provided an individual grievor with notice of the date of the membership meeting at which his grievance will be discussed. Mr. Gormley was not, therefore, treated in a discriminatory manner by not being specifically informed that his grievance would be dealt with at the September membership meeting.

24. While the Board is satisfied that in the areas discussed above the union did not process Mr. Gormley's grievance in a manner that was arbitrary, discriminatory or in bad faith, one aspect of the case requires further consideration, that is, whether the very practice of not informing a grievor when his grievance is intended to come before the membership violates the union's duty of fair representation. A review of the Board's decisions on this point shows that the parameters of the union's duty of fair representation in this regard have not been clearly defined.

25. In *Joseph Pap*, [1974] OLRB Rep. Jan. 60, the Board was faced with a situation where the union failed to advise a discharged grievor or his lawyer either of a change of date in the usual monthly meetings or that it was going to discuss Mr. Pap's grievance at its next monthly meeting. On the basis of these omissions, the Board found that the union had violated its duty of fair representation. On the face of the decision, however, it is not clear whether the Board thought that the failure to notify Mr. Pap of the new date of the general membership meeting was more important, less important or of equal importance as the union's failure to notify Mr. Pap that they would be considering his grievance at the next membership meeting. As well, the decision does not indicate whether or not the union had a general practice of notifying its members of the meeting at which their grievances would be discussed. In its reasons for decision, the Board emphasized the fact that Mr. Pap was treated in a different manner from the other members of the bargaining unit which might indicate that the Board either gave more weight to the union's failure to notify Mr. Pap of the change in the date of the union meeting or that it was the union's normal practice to advise grievors of the general membership meetings at which their grievances would be discussed. The Board said at p. 62,

But, the union by its omission denied Mr. Pap and his lawyer the right to attend the union meeting. This was not mere negligence; it was either an intentional act or an act that was, in the circumstances, so reckless that it must be considered to be intentional. The act of the union officials was therefore to deny Mr. Pap the democratic right to attend at a meeting to put his position before the membership and within the limits of the union's own procedure it acted arbitrarily.

...Union officials and representatives usually have greater knowledge than the employees with respect to matters of collective bargaining and particularly with respect to individual employee's relationships with their employer. Because of this expertise and experience the union had an obligation to notify Mr. Pap and it is not relieved of its obligation merely because Mr. Pap should have known to attend the regular monthly meeting.

Thus, the union's own standards which provided employees with a democratic forum were violated.

The denial of access to the union meeting, if not arbitrary, was discriminatory, since Mr. Pap should have been allowed the same access to the union as were other members of the union.

26. The decisions that have followed *Pap* have not been clear as to whether a trade union, as a general rule, must give notice to a grievor of the general membership meeting at which a determination will be made as to whether or not his grievance should proceed to arbitration. (See for example, *Ralph Sevigny*, File No. 0234-76-U, decision dated June 9, 1976; *El Mocambo Tavern*, [1972] OLRB Rep. Oct. 862; *Karl Krafczek*, [1974] OLRB Rep. June 392 and *Damiano Pedalino*, [1975] OLRB Rep. 874.

27. As a general approach, however, the Board has been careful not to allow section 60 of The Labour Relations Act to interfere unduly with the internal administration of the union, recognizing that the manner in which a union may properly dispose of grievances may vary widely from one union to another. In assessing the standards of conduct required of a union to meet its duty of fair representation, the Board in *Gebbie and Longmoore*, [1973] OLRB Rep. Oct. 519 indicated at page 526 that in each case the Board should look to the practices and procedures that have gained acceptance in that community:

This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, *the norms of the industrial community and the measures and solutions that have gained acceptance within that community*; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) at 521 at p. 546.

(emphasis added)

The Board's basic posture, therefore, is that it should not disturb a union's internal procedure except to the extent that those very procedures may in themselves be arbitrary, discriminatory or in bad faith. Instead, the Board seeks to ensure that a union act fairly and reasonably within the procedures that it has established for itself.

28. Having regard to these underlying principles developed to administer section 60 of the Act, the Board is satisfied that the union in this instance did not violate its duty of fair representation by failing to inform Mr. Gormley that his grievance would be discussed at the September general membership meeting. For twenty-three years the union has adopted the procedure of not specifically informing grievors when their grievances will be discussed at membership meetings. The President indicated his view that to specifically notify each grievor of the relevant membership meetings would place an onerous task on the union as the unit is extremely large and hundreds of grievances are processed annually. The evidence indicates that the union's mode of procedure has gained acceptance among its members and has not been the subject of complaint. The union in this case treated Mr. Gormley in the same manner as it has treated every other grievor. The union did not deny him access to the democratic forum established for resolving grievances. If he had wanted to attend the membership meeting he certainly could have. This case differs from the *Pap* case in that the date of the regular membership meeting had not been altered and the grievor was well aware of the date. As well, this case may be distinguished from *El Mocambo Tavern* and *Pedalino* where the grievors or their representatives or lawyers had made it clear to the union that they wanted to be kept informed as to the state of the grievances. Mr. Gormley never asked the union to wait until his return from vacation before dealing with his grievance nor did he specifically ask to be kept continually informed of the processing of his grievance or the date of the meeting at which his grievance would be discussed by the membership.

29. For the reasons given above, therefore, the Board finds that the union did not violate its duty of fair representation in processing Mr. Gormley's grievance.

1775-77-U Boart Hardmetals (Canada) Limited, (Applicant), v. International Union, United Automobile, Aerospace and Agricultural Implements Workers of America (U.A.W.) and its Local 1256, Frank Kenny, Wolfgang Hock, James Steel, John Phillips, John Seddon, James Coutermann and Clifford Hicks, (Respondents).

Collective Agreement – Strike – Whether following an A.I.B. rollback the parties must renegotiate their collective agreement and resort to conciliation before a strike becomes lawful.

BEFORE: Donald D. Carter, Chairman.

APPEARANCES: *R.W. Cosman and D.N. Corbett for the applicant; L.A. MacLean and Frank Kenny for the respondents.*

DECISION OF THE BOARD; February 23, 1978.

1. This is an application brought under section 82 of the *Labour Relations Act* seeking a declaration and direction in respect of a work stoppage.

2. The work stoppage in this case followed upon the heels of an implementation by the applicant employer of a decision of the Anti-Inflation Board restricting compensation payable to the members of the bargaining unit represented by the respondent union and its local. The applicant and the respondent union and its local were parties to a collective agreement expiring on January 3, 1977. In the process of making a new collective agreement, the parties went through the conciliation process provided under the Act, which culminated in what is commonly referred to as a "no-board report" on March 14, 1977. Following the release of the no-board report, on April 14, 1977, a legal strike occurred and later, on April 20, 1977, a memorandum of agreement was entered into by the applicant and the respondent local union. The memorandum of agreement provided that it was to expire on January 5, 1980. The return to work commenced on April 22, 1977.

3. No reference was made in the memorandum of agreement to the possibility of a rollback by the Anti-Inflation Board. The agreement, however, was submitted to the Anti-Inflation Board for review, as required by law. The initial response of the Anti-Inflation Board was to reduce in all three guideline years the compensation payable under the agreement. At the request of both the applicant and the respondent union, the Anti-Inflation Board reconsidered its initial decision and, on November 14, 1977, informed the applicant that compensation need only be reduced for the second guideline year. On November 15, 1977, the respondent union was informed of this decision.

4. Following the reconsideration by the Anti-Inflation Board, the respondent union took the position that the applicant must either pay full compensation as provided by the agreement, or negotiate a new agreement. On February 16, 1978, in order to comply with the decision of the Anti-Inflation Board, the applicant did not pay the full increase of the cost of living allowance provided under the agreement. The union in support of its bargaining position called a strike. A work stoppage commenced on February 17, 1978, and was continuing as of the date of the hearing in this matter. The applicant has indicated that it is prepared to negotiate the implementation of the rollback once the work stoppage has ended.

5. The issue before the Board is whether the strike is one permitted by the *Labour Relations Act*. The applicant argued that the effect of the rollback was to render the memorandum of agreement void only from the moment of the rollback, putting both parties in the position of having to negotiate a successor collective agreement. As a result, the parties were required to exhaust the conciliation process under the Act before resorting to economic sanctions. The respondents argued, however, that the compensation package must be treated as a whole so that a rollback of any part of that package by the Anti-Inflation Board rendered the collective agreement void from its inception.

6. The effect of a rollback upon a collective agreement which does not provide for that eventuality has already been considered by this Board. See *Croven Ltd.*, [1977] OLRB Rep. Mar. 162; *Libby, McNeill & Libby of Canada Ltd.*, [1977] OLRB Rep. Apr. 204. The Croven decision makes it clear that the rollback has sufficient impact upon the existing agreement so that the agreement itself cannot constitute a bar to a strike or lockout. In the words of the Board in that case, "it [the existing agreement] no longer embodies the freely

negotiated 'agreement' of the parties from which flows the rights arbitration and strike prohibitions of the Act." The rollback, however, does not render the collective agreement void from its inception, as the Board clearly indicated in *Libby, McNeill & Libby of Canada Ltd.* The collective agreement, in the Board's view, exists to the point of the rollback and can be treated as nullity only from the point of the rollback forward.

7. This approach avoids the retroactive creation of a legal vacuum for the period of time from the inception of the agreement to the point of the rollback, a period during which the parties, and third persons, may have acted in reliance upon the rights and obligations spelled out in the agreement. A serious disruption of a collective bargaining relationship would occur if all actions taken in reliance upon a collective agreement prior to the rollback were rendered null and void by the rollback. Treating the collective agreement as being only void from the point of the rollback avoids these disruptive consequences.

8. The Board does not accept the arguments of the respondents that this approach either sanctions an illegal agreement or forces one party to accept something that it did not negotiate. Once the rollback has occurred, the parties must necessarily negotiate over the implementation of the rollback, including its application to the period of time during which the collective agreement remained in force. Where the agreement is treated as being void from the point of rollback, the range of trade-offs available to the parties is as extensive as where the collective agreement is treated as being void *ab initio*. In either case, the parties must take into account both the legal limitations placed upon them by the controls legislation and the benefits, both monetary and non-monetary, that have already passed between them.

9. The conclusion here is that the collective agreement was rendered void as of the point of the rollback by the Anti-Inflation Board. This event put the parties in the position of negotiating a successor collective agreement, giving rise to the requirement to resort to the conciliation process before resorting to economic sanctions. This condition, imposed by section 63(2) of the Act, has not been met and the strike must be considered an illegal strike.

10. The Board, therefore, declares that the strike now occurring at the applicant's premises is illegal under the *Labour Relations Act* and directs that the respondents International Union, United Automobile, Aerospace and Agricultural Implements Workers of America (U.A.W.) and its Local 1256, Frank Kenny, Wolfgang Hock, James Steel, John Phillips, John Seddon, James Couterman and Clifford Hicks cease and desist from continuing such illegal strike or doing any act which they know or ought to know as a reasonable and probable consequence of such act would result in the continuation of the illegal strike.

0307-77-U John Farrugia, (Complainant), v. Ontario Public Service Employees Union, Local 240, James M. Allen and R. Alen Dalsto, (Respondents).

Duty of Fair Representation – Effect of trade union initiating grievance concerning a con-

tract interpretation which would adversely affect an employee in the unit

BEFORE: E. Norris Davis, Vice-Chairman.

APPEARANCES: *Steven Bellissimo for the complainant; George A. Richards for the respondent.*

DECISION OF THE BOARD; February 7, 1978.

1. This is a complaint that the respondents have contravened sections 76(3), 77 and 78 of the Act Respecting Collective Bargaining for Colleges of Applied Arts and Technology in endeavouring to process to arbitration a union initiated grievance seeking a contract interpretation which would adversely change the complainant's security standing.

2. The complainant is a Teaching Master in Economics in the Business Administration Faculty of Mohawk College and has been since 1969. He had been Secretary-Treasurer of the union until his resignation from that post on September 24, 1974.

3. Central to the issue is a collective agreement signed on September 17, 1975, covering the academic employees at Mohawk. The evidence established that this agreement included, for the first time, a section dealing with the whole seniority area on a comprehensive basis and is identified as Article 8 of that agreement. For our purposes it is necessary to refer to Article 8.11 which reads as follows:

"8.11 A full-time employee shall continue to accumulate continuous service for the purpose of this Article while he:

- (a) is in the College's active employ;
- (b) is absent for up to three (3) months through verified illness or on leave of absence;
- (c) is on sabbatical leave for up to twelve (12) months".

4. The bargaining preceding the collective agreement was conducted under the statute respecting Collective Bargaining for Colleges of Applied Arts and Technology and involved some 22 Colleges. The individual bargaining units were represented by a team, elected from a meeting of delegates province-wide, from all the bargaining units concerned. Mr. Alen Dalsto, a Teaching Master at Mohawk for 8-9 years represented the Mohawk unit on the bargaining team along with 7 others from Mohawk. Mr. Dalsto was at that time President of the local union and so continued until the fall of 1976 when he relinquished that post but remained as a member of the Executive Committee until April 1977. Mr. Dalsto is no longer a member of the union but continues to pay dues under the agreement.

5. Following the execution of the collective agreement, Mr. Dalsto had a number of discussions with the Mohawk Personnel Director, Mr. Dennis Avery, as to the steps to be taken in preparation of the original seniority list. Mr. Dalsto's position was that Article 8.11 was to be applied, in the preparation of the lists, as though it had been in force throughout the employment of all individual employees. Mr. Avery took the position that the absence of adequate information in the records in respect to past events on which to base judge-

ments made such an interpretation unrealistic and that, further, such an approach was of dubious ethical quality.

6. The disagreement was discussed in the union's Executive Committee. In January 1976 the College belatedly published a seniority list which gave no recognition to the position of the retroactive impact of Article 8.11 as had been urged by the union. On February 16, 1976 a letter was sent over Mr. Dalsto's signature to Mr. S. Mitminger, President of Mohawk extending the period of challenge to the lists and again re-stating the union's view as to the method to be used in compilation.

7. Discussions continued between the union and the College as a result of an Executive Committee decision that the matter should be pursued. It is noted that a Mr. Prem Ray, then an Executive Committee member, participated in the discussions and that Mr. Ray was one of the individuals whose seniority status would be adversely affected by implementation of the union position.

8. The complainant, Mr. John Farrugia, was also a person whose seniority status would be adversely affected inasmuch as he had taken a year's leave of absence in 1972. Mr. Farrugia concluded in June 1976 that the matter was likely to be resolved by the College accepting the union position and he spoke with Mr. Dalsto who was then union President.

9. Mr. Farrugia expressed his views to Mr. Dalsto that to apply Article 8.11 retroactively would be discriminatory and that, in the absence of adequate records, could not be uniformly applied. Mr. Dalsto was unpersuaded and in his view whichever view was taken someone would be adversely affected.

10. Mr. Farrugia talked with a Mr. Grant Bruce, an official of the Provincial union in June 1976. Mr. Bruce advised Mr. Farrugia that he had a strong case and that if his seniority date was changed he should grieve. It should be noted parenthetically that as of the time of this hearing there has been no change in Mr. Farrugia's seniority date.

11. Mr. Farrugia informed Mr. Dalsto of this opinion and Mr. Farrugia stated that Mr. Dalsto felt that if such a grievance were successful it would nonetheless be futile because it would merely give rise to a demand for contract amendment in future negotiations. Mr. Dalsto's testimony denied the reference to future negotiations and pointed out it would be illogical for him to forecast the action of the bargaining team. During the month of June 1976, Mr. Farrugia had lunch with Mr. Jas Allen – then Chief Steward (and now President since fall of 1976) of the union and two other faculty members. Mr. Farrugia and Mr. Allen got into a discussion about the merits of time spent on leave of absence being deducted for seniority purposes and apparently agreed to disagree. Mr. Farrugia then spoke to Mr. George Richards, in July 1976, the Provincial union's Grievance Officer who stated that he was impressed by Mr. Farrugia's argument. On Mr. Dalsto's suggestion Mr. Farrugia again spoke to Mr. Bruce.

12. According to Mr. Dalsto and to Mr. Allen the union felt in June 1976 that the College seemed to be accepting the union's position on Article 8.11, but by September it was clear that the parties were still in major disagreement. The union Executive Committee (consisting of some 20 members) had discussed the whole issue in an April 1976 meeting and made the decision that if the matter had not been settled to the union's satisfaction by

September that they would file a grievance. Mr. Dalsto states that he was the prime mover at this meeting and that the decision was taken unanimously or nearly so and that even Mr. Prem Ray (whose seniority would be adversely affected) was in favour of this course. Consequently the union filed a grievance on September 24, 1976, which was denied by the College at the first step of the grievance procedure.

13. Mr. Allen, who was then Chief Steward and who was responsible for the processing of this grievance, failed to abide by the contractual time limits for moving the grievance to the next step. Mr. Allen states that this was due to a mistaken assumption on his part as to what the contractual time limits were. Mr. Dalsto (then union President) was informed of this development by Mr. Allen on Mr. Dalsto's return from vacation.

14. The union was then of the opinion they could not re-file an identical union grievance and that the matter, if it was to be processed, would have to be by way of either a group grievance or an individual grievance. Mr. Allen, in an effort to repair the results of his delinquency, in the words of Mr. Dalsto "jumped in with both feet and lodged an individual verbal formal complaint" in October 1976.

15. Mr. Allen and Mr. Farrugia are both members of the Business Administration Faculty and Mr. Allen was then the union departmental representative. Mr. Allen states that this verbal complaint was not made against Mr. Farrugia personally but in general terms regarding the application of Article 8.11. Mr. Allen further stated that when he met with Mr. Conrad Tromm, the Chairman of the Business Department, that it was only in response to Mr. Tromm's enquiry as to who could be affected that Mr. Allen introduced Mr. Farrugia's name.

16. Mr. Tromm, in his testimony, stated that he considered Mr. Allen's complaint as being directed personally against Mr. Farrugia. He rightly pointed out that he was not empowered to deal with a union grievance and had he understood this to be a union grievance rather than a personal complaint, he could have directed Mr. Allen to the Director of Personnel. Mr. Tromm reviewed the written denial of the complaint written himself on October 28th, 1977, and affirmed this to be an accurate description of the meeting. A written report by Mr. Tromm to the Personnel Director includes the following:

"On October 26, Jim Allen of the Business Department formally complained to me with regards to the application of Section 8.11 by the College in the case of John Farrugia. He suggested that Mr. Farrugia, who took a leave of absence from the college in 1972, for a period exceeding 3 months should have this fact reflected in his continuous service record".

Having had the opportunity of viewing the demeanour and conduct of both witnesses, we must prefer Mr. Tromm's testimony over Mr. Allen's and accept as a fact that this complaint was directed against Mr. Farrugia, in the sense that its only purpose was to attempt to effect a change in the seniority status of Mr. Farrugia. This conclusion that the action is to be interpreted as a personal complaint against Mr. Farrugia is buttressed by Mr. Dalsto's testimony when referring to the formal verbal complaint, he states he told Mr. Allen "a couple days later" that "look, maybe it would be cleaner if we filed the group grievance. Nobody will think it is personal". Mr. Dalsto further said at that time that he and Mr. Allen

would sign the group grievance, which they did and which was submitted on October 29, 1976.

17. While Mr. Farrugia was unaware of the formal verbal complaint at the time of its processing, it appears that at some point after October 28, 1976 the College's Personnel Director, Mr. Avery, for whatever reason delivered to Mr. Farrugia, a copy of Mr. Tromm's written report of the episode which was dated October 28th. Mr. Tromm also states that when he learned that Mr. Farrugia had a copy of this memo, Mr. Tromm felt that it would only be fair that Mr. Allen should similarly have a copy and personally delivered it to Mr. Allen some two weeks after October 28, 1976. Mr. Allen, in his testimony, could not recall having received the document. The Board is satisfied that he did, in fact receive it.

18. Sometime in November 1976 Mr. Allen became President of the Local and at that time, according to Mr. Allen's testimony, Mr. Farrugia congratulated him on his election and also said "don't forget I'm probably going to pursue my philosophy on seniority" to which Mr. Allen replied, "go ahead".

19. On November 22, 1976 Mr. Farrugia spoke to Mr. Allen and asked if Mr. Allen had filed a formal verbal complaint against him. Mr. Allen denied that he had.

20. On November 22, 1976 the group grievance of October 29, 1976 was heard by Mr. Mitminger, President of the College. According to Mr. Allen the union alleged the College was not following the contract in the construction of seniority lists and there was no suggestion that it was only Mr. Farrugia's status which was in question. On November 24th, Mr. Mitminger denied the grievance and on December 1st the union advised the College of their intention of having the matter arbitrated.

21. On November 25, Mr. Farrugia met with Mr. Allen at the latter's request and Mr. Farrugia repeated his question as to whether Mr. Allen had filed a personal complaint against him, which brought the counter-question from Mr. Allen as to "who told you that?". Apparently the discussion became increasingly heated and at one stage, according to Mr. Farrugia, Mr. Allen said "you jerk, tomorrow I will call a meeting with Avery, Mitminger, Tromm, you and myself". (Mr. Allen's version differs only in respect to the use of the term of opprobrium).

22. Mr. Farrugia states that his reply was that he would be unable to attend such a meeting because of classes. This was countered by Mr. Allen who said, "you're not President. I am President. Cancel your classes". Mr. Allen testified that he replied that he did not normally cancel classes, to which Mr. Allen's reply was, "if you do not drop this whole thing I will beat the hell out of you". Mr. Allen's version again differs and his recollection of his statement was "John, don't play games because I'd just as soon take someone like that out into the parking lot and beat the living hell out of them". Mr. Allen denies that his statement was preceded by "if you do not drop the whole thing".

23. This meeting which took place at Mr. Farrugia's desk was brought to an end after Mr. Farrugia pointed out to Mr. Allen that he was threatening him physically (to which according to Mr. Farrugia, Mr. Allen's response was "I do not remember anything") and Mr. Farrugia asked him to leave three times (Mr. Allen's recollection is that it was only twice).

24. On November 26, Mr. Farrugia wrote and hand-delivered to Mr. Allen a demand for withdrawal of the threat and an apology by November 29. There was no discussion and Mr. Farrugia found his memo to Mr. Allen in a sealed envelope returned to his own desk on November 29. Mr. Farrugia then again approached Mr. Allen who said "anything you want to say, say it verbally and not in writing. You are saying to people that I filed a complaint against you". According to Mr. Farrugia, Mr. Allen repeated his threat to beat the hell out of him. Mr. Farrugia departed.

25. On November 29, at Mr. Farrugia's request, Mr. Tromm convened a meeting with Mr. Farrugia and Mr. Allen at which time Mr. Farrugia delivered a copy of the November 26 memo to each of them. Mr. Farrugia informed Mr. Allen that unless he withdrew the threat and apologized he intended to proceed. Mr. Allen's response was "I will withdraw the statement if you will retract that I filed a complaint against you".

26. In respect to this episode, Mr. Tromm confirms that Mr. Farrugia complained on November 25 that Mr. Allen had threatened him. Mr. Tromm spoke to Mr. Allen and asked him to keep the conflict (which was known throughout the faculty) on a civil basis. Mr. Tromm confirms the detail of the November 29, 1976 meeting and states that there was no denial by Mr. Allen of the threatening words. Mr. Tromm also testified that he had had a further complaint from Mr. Farrugia on December 2nd, 1976, that he had been called a "turkey" by Mr. Allen while passing him in the hall, and at least two further instances of similar remarks being made by Mr. Allen during the course of this hearing were reported. Mr. Farrugia states that he attempted to talk to Mr. Allen on November 30, 1976. Mr. Allen indicated he was too busy at that time but would let Mr. Farrugia know when he could see him. Nothing developed out of this contact and Mr. Farrugia states he then ceased talking with Mr. Allen other than through the Chair at membership meetings because of the physical threat.

27. On December 13, 1976 there was a general membership meeting at which Mr. Farrugia raised for discussion both the formal verbal complaint filed by Mr. Allen and the group grievance. In respect to the former Mr. Allen was asked if Mr. Farrugia's name appeared therein and replied "No". In respect to the latter, Mr. Farrugia asked, through the Chair, for information from Mr. Allen regarding contract interpretation of Article 8.11 and advised the meeting that there was a lack of information from Mr. Allen respecting people who would be affected and that such information should be brought forward. According to the minutes of the meeting filed with the Board there was an "heated exchange". Mr. Farrugia made a motion that the appeal to arbitration be dropped which was lost on a show of hands. While not recorded in the minutes Mr. Allen testified that the vote against the motion was 61 to 1. Mr. Gordon Rice, a union member who attended the meeting summed it up as "very generally there was a discussion over the seniority issue and Mr. Farrugia seemed to be trying to establish that it was a personal attack on himself while Mr. Allen sought to establish that it wasn't only Mr. Farrugia". Mr. Rice affirms that Mr. Farrugia did read the portion of Mr. Tromm's memo dealing with the formal complaint and which is previously quoted and that Mr. Allen's answer to that was "No".

28. The minutes of this meeting, filed with the Board, contains, inter alia, the statement,

"Al Dalsto explained that the union felt that clarification was necessary

on the seniority clause negotiated in the last Contract. ... He said Mr. Farrugia was mentioned as an example, though not singled out. 'We lodged a group grievance which has gone to arbitration', Al reported. 'Roughly 400 people could be disadvantaged as opposed to 20 being advantaged the other way'."

29. We turn to consider the events leading up to the union's processing this grievance to arbitration. It is clear that from the time the collective agreement was signed that the local union executive took the stance on the interpretation of Article 8.11 which it continues to maintain and equally clear that the employer held a contrary opinion. The evidence of Mr. Dalsto, which we accept, is that the matter was discussed by the union Executive Committee in April 1976 and that he was the prime mover in urging that the union proceed to arbitration if the matter were not satisfactorily settled by September. Not without significance was the presence in the Executive Committee of an employee whose seniority status would suffer by acceptance of the union position and who is reported as having nonetheless, supported the position.

30. The applicant urges that the fact that the Executive Committee decision was made without a reference to the membership and, that it was not published, are facts from which the inference can be drawn that the Committee was deliberately endeavouring to stifle membership knowledge. In view of the size of the Committee (some twenty members) we would be hard put to draw such an inference. In any event word of the dispute was seeping around by June 1976 and the applicant took steps to express a contrary view to the union's interpretation at different levels of local officials and head office officials, albeit he was not aware until late November 1976 that a group grievance had been filed nor that a nominee had actually been appointed to the Arbitration Board – all of which was reported at the December 13, 1976, membership meeting.

31. It was only at this point that Mr. Farrugia, who had been conducting a reasoned campaign for his view of Article 8.11, came to view the union position as being motivated against him personally. This was as a result of the inept misadventures of Mr. Allen in handling the grievance processing. This view of Mr. Farrugia's was fortified by the intimidatory language used by Mr. Allen and Mr. Allen being less than frank in his discussions of the verbal formal complaint with Mr. Farrugia. The rhetoric employed might well have led Mr. Farrugia to the reasonable conclusion that he could not expect to be fairly represented by Mr. Allen. However our concern is whether in fact Mr. Farrugia was represented in such a manner as to breach section 77 of the Act. We must conclude that the entire verbal formal complaint episode was directed in Mr. Allen's mind to rectifying his previous grievance processing delinquency rather than to achieving a change in Mr. Farrugia's seniority status *per se*. That the alternative selected by Mr. Allen was ill-suited to the objective was bound to raise in Mr. Farrugia's mind the conclusions indicated and Mr. Allen's refusal to make full disclosure about this matter which touched on Mr. Farrugia's personal status was a breach of the standard of representation which Mr. Farrugia was entitled to expect.

32. In our view, the withholding of information by Mr. Allen in respect to a matter which vitally interested Mr. Farrugia, i.e. a personal complaint that would affect his seniority status, and to which Mr. Farrugia was given no opportunity to defend because of lack of knowledge was bad faith representation by Mr. Allen. When coupled with the physical threats designed to have Mr. Farrugia cease pursuing the matter it is clear that Mr. Allen contravened the obligations laid on the union under section 77 of the Act.

33. The broader question is whether apart from Mr. Allen's activities the union, by its handling of this grievance has breached section 77 of the Act. It should be noted that Mr. Dalsto and not Mr. Allen was the major union official active in seeking to have the College accept the union interpretation of Article 8.11 in the preparation of seniority lists and was also the chief spokesman on the Executive Committee in favour of processing a grievance to arbitration. There was no evidence of any personal animus between Mr. Dalsto and Mr. Farrugia nor – apart from the Allen episode – any suggestion that the actions were directed personally against Mr. Farrugia. The complainant does, however, argue that the Executive Committee decision to pursue the grievance without prior reference to the membership and without either a knowledge of, or consultation with those affected coupled with its failure to provide information to the membership except as initiated by Mr. Farrugia, and its failure to accept the legal opinion that an arbitration would be unsuccessful all indicate the presence of arbitrariness and bad faith in the union's representation of its members. No evidence was led by either party that established that the actions of the Executive Committee in the case of this grievance differed in any way from its normal grievance handling, nor that there was any failure to abide by required internal by-laws and procedures of the organization.

34. The evidence, as above related, establishes that the matter was aired in the general membership meeting of December 13, 1976. Evidence also establishes that on June 14, 1977, the union's legal officer directed a legal opinion to the local union concluding that the proposed arbitration would not be successful and recommending that the whole matter be reviewed. That opinion and all other business was laid over to the September re-opening of the College. At the September Executive Committee meeting the recommendation of counsel that the matter be again placed before the membership was approved and it was set down for discussion at a meeting on November 7, 1977.

35. In the meantime a union membership meeting was held on October 3, 1977 at which a motion sponsored by Mr. Farrugia to the effect:

“that members of this Branch affected by the grievance under Article 8.11 (Seniority) be informed by the union Executive”.

The motion was carried, after a suggestion from the floor that:

“we might solve this problem by publicizing the information so that people who would be affected would know automatically. There was general agreement”.

36. Accordingly, a notice was posted over Mr. Allen's signature notifying the membership that if the union group grievance were successful “anyone having taken a leave of absence prior to 75/9/1 will have his/her seniority adjusted according to the terms of that section”.

37. Also subsequent to the October meeting and prior to the November 7, 1977 membership meeting there was circulated to all members a document on “The Seniority Issue”. This consisted of a summary of events by Mr. Allen, an outline of the problem and the union position by Mr. Dalsto, and the June 14, 1977 legal opinion advising that the arbitration was unlikely to be successful. In the opinion of the Board this document pin-pointed the is-

sue which was being processed to arbitration and by virtue of the June 14, 1977, legal opinion provided notice that it might be a weak case.

38. The November 7, 1977 membership meeting was held. No minutes were produced to the Board and we therefore rely on oral testimony.

39. Mr. Farrugia agrees that at this meeting there was a full opportunity for discussion and that the matter was discussed in depth. A motion was approved (vote of 38 to 6) that the arbitration be proceeded with. There is no doubt that throughout this period Mr. Farrugia acted as a gadfly to the union Executive in ensuring full membership discussion and review.

40. The nature of the respondent's obligations under Section 77 of the Act are best set out in the case of *Gebbie & Longmoor v. United Autoworkers Local 200 and Ford Motor Company* [1973] OLRB Rep. Oct. 519 at para. 38 wherein it is stated:

"Section 60 of The Labour Relations Act is to ensure that individual rights are not abused by the majority of the bargaining unit; ... it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees as well as the collective group It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected ... to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision ...".

41. We find ample evidence that the respondent union through its Executive Committee and its general membership has shown no element of arbitrariness or refusal to direct its mind to the problem. Nor can it be found that the union was motivated by a hostility against Mr. Farrugia individually in taking the position it does: it is a fact of life that few seniority disputes can be resolved without both enhancing the position of some individual and concurrently affecting some other individual adversely. In any event what the union seeks to do is to have the matter referred for an impartial third party decision.

42. This case raises the question as to whether a bargaining agent's act of seeking a contract clarification or interpretation can, in itself, be found to be a breach of its duty to fairly represent all employees. The mere fact that the ruling sought may have the effect of changing the status of individual employees from that which existed prior to arbitration does not seem to be relevant. By definition, the arbitration function is to clarify for the parties the true intent and meaning of the language they have previously agreed on. The arbitration process does not result in any change in language but merely makes clear what that language has meant since its inception: the arbitration process is one of adjudicative impartiality, uninfluenced by the special interests of the parties. The nature of the process is such that it is independent of the motives or special objectives sought to be served by one or the other of the parties, and stands on the high ground of merely "making the truth known". Such being the nature of the arbitration process it is impossible to conceive – absent a fraud perpetrated on a Board of Arbitration – that its award could affect any individual employee in any manner other than as provided for in the collective agreement. The seeking of an impartial ruling from an arbitrator by a union is the antithesis of discrimination, arbitrariness

or bad faith: it is voluntarily putting the entire issue for resolution in the hands of an independent third party. It should also be noted that this Board, on many occasions, in which an employee has alleged unfair representation by a bargaining agent, has directed the substantive issue involved to be tried in arbitration as being the appropriate remedial action. In the instant case we find no breach by the respondent union of section 77 of the Act other than the Allen episode which in our opinion was tangential to the main issue of clarifying the meaning of Article 8.11, and should not be permitted to interfere with the final solution.

43. The complainant's claimed relief of a prohibition of processing the particular grievance to arbitration is denied, as is the claim for punitive damages. In view of the information before the Board of Mr. Allen's continuing conduct of overt hostility, the Board directs that the union through its officers and officials cease and desist in all conduct inhibiting Mr. Farrugia from seeking and having made available to him proper representation by his bargaining representatives.

1251-77-R United Brotherhood of Carpenters & Joiners of America, Local 2679, (Applicant), v. 358602 **ONTARIO LIMITED** operating as **Innovative Wood Products**, (Respondent).

S. 79 – S. 61 – Whether union intimidation or coercion – Effect on membership evidence.

BEFORE: M. G. Picher, Vice-Chairman and Board Members P. J. O'Keeffe and W. H. Wightman.

APPEARANCES: *H. Goldblatt, W. Oliveira and O. Zanin for the applicant; Morris C. Orzech, Leslie Brown and Donald Snider for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER P. J. O'KEEFFE: February 14, 1978.

1. The name: "Innovative Wood Products" appearing in the style of cause of this application as the name of the respondent is amended to read: "358602 ONTARIO LIMITED operating as Innovative Wood Products".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. In both its material filed and its submissions at the hearing the respondent made a number of allegations in support of a motion that the instant application be dismissed or, alternatively that a representation vote be ordered. It alleges firstly that there was managerial involvement in this application, contrary to section 12 of The Labour Relations Act. Secondly, it alleges that membership documents were unlawfully solicited from employees during working hours. It next alleges that the membership documents submitted by the ap-

plicant contained fraudulent signatures. Lastly, it claims that the application should be dismissed because of intimidation and coercion of employees by the applicant or its supporters, contrary to section 61 of The Labour Relations Act.

5. We deal firstly with the allegation that there has been a breach of section 12 of the Act. That section provides:

12. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

6. The evidence establishes that on November 7, 1977, some twelve employees met at a house owned by Frank Gironda. Shortly prior to that date Mr. Gironda had been fired from his job as a foreman with the respondent. At the meeting in question he suggested to the employees that their interests would be better protected by a trade union; the employees present agreed and all of them then signed documents joining the applicant union. We see nothing in these circumstances that is contrary to section 12 of the Act.

7. The purpose of that section is to ensure that an arms-length relationship, fundamental to collective bargaining, is present between union and employer in any application for certification. (*The Dr. George A. Morgan United Auto Workers Dental Centre* [1977] OLRB Rep. Jan. 1). There is no suggestion in the instant case that Mr. Gironda was acting on behalf of or in the interest of the respondent employer. (cf. *Children's Aid Society of Metropolitan Toronto* [1976] OLRB Rep. Nov. 651 at 657). Since the discharged foreman was not acting in the interest of the employer or on its behalf, but rather to the contrary, the Board finds that there was not, in these circumstances, a breach of section 12 of the Act.

8. Having regard to the second allegation, the evidence establishes that there was some soliciting of union support during working hours. The short answer to that submission is that there is nothing in the Act to prohibit such conduct. Section 62 of the Act provides as follows:

62. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

The effect of that section is to make it clear that nothing in The Labour Relations Act clothes any person with an absolute right to solicit trade union support during working hours. But neither that section nor any other provision of law makes it expressly unlawful to do so. We therefore find nothing in the conduct of the applicant in this regard to justify the dismissal of the instant application or to cast any doubt on the membership evidence.

9. With regard to the authenticity of the signatures appearing on the membership documents filed we are satisfied that no irregularity has been made out. The documents consist of twenty application cards and one certificate of membership. Each of the application cards bears the signature of the applicant in two places: one signature is to signify the

intention to apply for membership and the other is to certify the payment of an initiation fee of \$1.00. The cards do not bear the signature of a witness but do bear the signature of the employee in question beneath a statement to the effect that the employee has been a member of the union since 1965. It is certified as correct by the signature of the business representative of the trade union. All of the signatures of the employees have, pursuant to the Board's normal practice, been carefully compared to sample signatures of each of the employees provided to the Board by the employer. All of the signatures appearing on the membership documents filed correspond to the sample signatures provided. In the absence of any specific evidence of deceit or irregularity in respect of these signatures the Board sees no reason to doubt their validity.

10. We turn lastly to the final allegation made by the employer. It alleges that the applicant trade union or its supporters engaged in coercion and intimidation of the employees in the bargaining unit during the course of its membership campaign. It is necessary to situate the employer's allegations in their factual context. This application was filed on November 9, 1977. The next day, upon learning of this application and of the support of its employees for the union, the employer fired all of the employees in the bargaining unit. The dismissal occurred after two meetings in the plant during working hours in which the employees were addressed by Mr. Kopman, President of the respondent company. At the first meeting he asked which of the employees supported the union. When no individual answers were volunteered someone responded that everyone supported the union. He then sent his employees back to work and met briefly with his plant manager and his foreman, Hans Jokiel. According to Mr. Jokiel's testimony management then made the decision to forthwith dismiss all of the employees. The foreman testified that the dismissal was intended to be temporary with the purpose, as he smilingly put it, "to give both parties time to think". At the brief second meeting management's decision was communicated to the employees by Mr. Kopman. The employees were then all sent home directly, although they were not then told their discharge would be temporary.

11. Complaints under section 79 and 83 of The Labour Relations Act were thereupon immediately filed by the applicant against the employer, alleging illegal discharges and an unlawful lock-out. Those complaints were withdrawn as the employer immediately reacted by reinstating all of the employees with full compensation for the day or so of work that they had lost.

12. The employer's harsh action in even temporarily discharging its employees had an obvious impact. Francesco Mancini, an employee of some five months standing who had been a union supporter testified that the temporary discharge caused him to change his mind about the union. He was later told on December 2, 1977, by Ignazio DiStefano, a fellow employee who approached him in the plant, that he should not change his mind and that there were persons who could hurt him.

13. Two other employees gave evidence in respect of threats. The first was Rachmil Licht, an employee who never supported the applicant union. At the second discharge meeting of November 10, 1977, Mr. Licht was outspoken among his fellow employees, telling them that they would be better off with their job and no union, than with a union and no job. The following week he was approached at work by Mr. Salvatore Canepa, an employee, who engaged him in a discussion about the union. Mr. Canepa told Mr. Licht that he should not talk against the union and that in the United States persons have been killed

for doing so. Mr. Licht explained that he was not against the union but that he did not wish to join. He then asked Mr. Canepa if he was mad at him and Mr. Canepa answered, "No" and shook Licht's hand as they parted. Mr. Licht had not signed a card prior to that conversation and did not sign one afterwards.

14. The last threat alleged was made against Harripersaud Narain, a cabinet-maker employed by the respondent and known in the shop as "Harri". On Friday, December 2, 1977, Mr. Narain was approached on the job by Mr. Mancini. Mr. Mancini told him that he had been threatened and that Narain was also "going to be beaten up". Later that same day Narain overheard another employee saying, "Harri doesn't know what is good for him". These two incidents caused Mr. Narain to fear for his own security to the extent that he stayed home from work on the day following. It is not clear, however, why Mr. Narain would have been subject of threats in light of his own testimony that he had never indicated to anyone whether he was for or against the union.

15. The issue in these proceedings is the quality of membership evidence filed by the applicant. If the documents filed were secured by a widespread pattern of coercion and intimidation the Board would, of course, assign no probative value whatsoever to those documents. Where, however, threats have been made in isolation by rank-and-file employees it is the practice of the Board to disregard only the particular membership cards which are directly tainted by the intimidation exercised. (see *The Kendall Company (Canada) Ltd.* [1975] OLRB Rep. Aug. 611).

16. There is no evidence of coercion or intimidation on the part of any officer of the applicant in the instant case. Nor is there any evidence of a widespread pattern of intimidation aimed at all of the employees in the bargaining unit or any substantial group of them. Since no membership documents were submitted in respect of Mr. Licht and Mr. Narain, the issue becomes whether the membership document signed by Mr. Mancini should be disregarded.

17. The Board is unable to place any substantial reliance upon the evidence of Mr. Mancini. He appeared confused and frightened in the witness box. Having regard to the way he described his change of heart about the union after the mass discharge it is not clear to this Board that he was any less afraid of his employer than he was of any fellow employee. His suggestion that he signed the membership card at Gironda's house with his hand and not his heart and then only because all of his peers were signing falls far short of establishing a breach of section 61 of the Act. There is a substantial difference between "going along with the crowd" and being subjected to intimidation and coercion within the meaning of the Act. Finally, the vagueness of his evidence about whether he paid \$1.00 at Gironda's or later at the lunchroom in the plant or perhaps not at all leaves that part of Mr. Mancini's evidence virtually valueless.

18. Mr. Mancini's evidence about the threat made by Mr. DiStefano on Friday, December 2, 1977, is simply not relevant to impeach the quality of the membership evidence in the instant case. On this application for certification the question before the Board is whether the membership documents submitted by the union represent the voluntary wishes of the employees who signed them on November 18, 1977, the terminal date fixed for this application. In the instant case the threat against Mr. Mancini was made after the terminal date. Any threat or intimidation contrary to section 61 of the Act taking place after that

date might well be the foundation for a complaint under section 79 of the Act and be a possible ground for the granting by this Board of its consent for leave to prosecute. But it does not operate retroactively to cast doubt on the voluntariness of a membership document that stood as a free statement of an employee's will on the terminal date fixed in the application. There is nothing in the evidence to suggest that intimidation was used against Mr. Mancini in order to get him to sign the union membership document, nor is there any evidence to suggest that he was coerced or threatened to prevent him from filing a timely statement of objection to the instant application. A threat against Mr. Mancini made on December 2, 1977, even if it were an actionable breach of the Act, could not cast doubt on the membership documents filed in these proceedings when those documents are taken as speaking as at November 18, 1977.

19. The only threat that occurred before the terminal date was the comment made to Rachmil Licht. No membership evidence was filed on behalf of Mr. Licht and the threat made against him would at most be an isolated incident independently perpetrated by a rank-and-file employee. The Board is satisfied that that event does not cast doubt on any of the membership evidence filed and is not grounds for the ordering of a representation vote or for the dismissal of this application. The motion of the respondent in that regard is denied.

20. The Board finds that all employees of the Respondent employed in its plant at 60 Oak Street, Metropolitan Toronto, save and except foremen, persons above that rank, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

21. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 18, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W. H. WIGHTMAN:

1. I dissent from the majority decision and would have granted the employees the right to express their feelings through a secret ballot vote to determine whether or not the union should represent them.

2. The majority award correctly describes the facts as I heard them adduced before the Board. Our disagreement is with respect to their interpretation and the decision to grant or withhold a vote as is our discretionary authority. The picture which emerges from the majority decision, as did the hearing itself, leaves me with the impression of what can most charitably be described as bizarre actions on the part of both the company and the union or persons acting as agents of the company or the union. What should be borne in mind, however, is the fact that union organizing campaigns are by their very nature emotional events due to the important consequences unionization will have for all parties concerned.

3. It is against this background that labour boards are responsible for determining the true wishes of the majority of the employees involved and it is the wishes of the employees, not the company nor the union, with which we should be concerned. The question frequently comes down to deciding whether we accept or reject individual letters or group petitions against the union as an expression of their true wishes and whether we accept membership authorization cards for the union as true expressions.

4. Letters and group petitions are subjected to very strict tests by the Board and at the most are likely to hurt the union only to the extent that the Board will direct that a secret ballot vote be held.

5. While membership authorization cards are rigorously scrutinized as to the authenticity of signatures, dates, and the payment of the one dollar initiation fee, they are less than foolproof as an indication of the true wishes of the employees. The value one can attach to membership evidence was questioned in an editorial of a leading American newspaper in the following terms:

When a union is organizing a company, it often tries to get the employees to sign "authorization cards". While the cards may indicate that the employee empowers the union to represent him, they usually are used only to petition the National Labor Relations Board for a representation election.

There is good reason for limiting the cards' use. The NLRB knows that the card signatures are obtained by buttonholing employees, often in groups. An employee may not even read the card; he may sign only because his friends do or merely to get the organizer off his back. It's hard to imagine anything less like an American-style election.

Nonetheless the labour board in recent years has frequently chosen to accept authorization cards as valid evidence of employee preferences. The excuse is that the employer has behaved so badly that a "fair" election is impossible. Even if that's so, it hardly seems an attractive alternative to accept the unfair cards.

In one recent case the employer, a restaurant corporation, did behave badly – at least by NLRB standards. On the day that the union filed for representation, the company announced that it was giving the employees new health, welfare and dental plans, along with a wage increase; a few days later the plans and the pay boost went into effect. The obvious message for the employees. Who needs a union?

The NLRB trial examiner was so disturbed by the company behavior that he threw out the result of the subsequent representation election, which the union lost. Moreover, since 26 to 45 employees had signed authorization cards, the examiner ruled that the company should be ordered to bargain with the union.

Fortunately, the board this time was somewhat more critical of the

cards. They were worded in English, the board noted, but 10 were signed by Mexican employees, some of whom could not read, write, speak or understand English. Furthermore, three employees didn't even know that the union existed when they signed cards. Two others signed in the impression that they were voting for the firing of an assistant manager.

The choice of a union, or no union, is one of the most important decisions an employee can make, since the union can strongly influence his economic future, for good or ill. Both the employer and the union should be able to state their sides of the issue, within reasonable limits, so that employees can make an informed choice.

Whenever the employer or the union oversteps those limits, a secret election still is a far better bet than recourse to the crudity of the buttonhole ballot.

6. Notwithstanding differences in legislation between Canada and the United States, the issue of determining the true wishes of employees is the same and, in my view, paramount.

7. It is fortunate that our legislation gives the Ontario Labour Relations Board the power to direct that a secret ballot vote be used to make that determination. I believe we should exercise that power more often and I would have done so in this case.

1161-77-U Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **MacDonalds Consolidated Limited**, (Respondent).

Lockout – Effect of employer disciplining employees who had previously engaged in an unlawful strike – Whether a lockout

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *John W. Keough, Guy Beaulieu and C. Hillmer appearing for the applicant; Harry Freedman, Lou Hogan, Gord Cannady and Max Dalley appearing for the respondent.*

DECISION OF THE BOARD; February 14, 1978.

1. This is an application for relief under section 83 of The Labour Relations Act wherein the applicant contends that the respondent did unlawfully lock-out a number of its employees. The Board dismissed the application orally at the hearing.

2. At all relevant times the applicant and the respondent were parties to a subsisting

collective agreement. Commencing on October 21, 1977 a majority of the employees in the bargaining unit defined in the collective agreement engaged in a strike contrary to the terms of both the agreement and The Labour Relations Act. Mr. D. Dairou, a witness called by the applicant, stated during his cross-examination that a similar unlawful strike of employees had occurred in April of 1977 and that at that time the applicant union had given its undertaking to the respondent that such an event would not occur again. The respondent took no disciplinary action against the employees with respect to the strike in April, but it did indicate that if such a strike should occur again the respondent would take severe disciplinary action against the employees involved.

3. On October 24, 1977 the respondent imposed disciplinary penalties on some fifty employees in response to their actions during the October strike. Two of the employees were discharged, five were suspended for two weeks, thirty-one were suspended for three days and twelve were suspended for a single day. In assigning these various penalties the respondent indicated that the more severe penalties had been reserved for those employees who had been most active in causing and supporting the strike. No discipline at all was imposed upon a number of employees who apparently took no part in the strike.

4. The representative of the applicant contended that the Board should draw the inference from the number of employees who had been penalized that the respondent's actions had been motivated by reasons other than a desire to merely discipline the employees. It was his contention that the respondent's actions amounted to a reprisal for the unlawful strike and that this type of motive was sufficient to justify characterizing the respondent's actions as an unlawful lock-out.

5. The definition of a lock-out, which is to be found in section 1(1)(i) of the Act, states as follows:

"lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employer's organization, the trade union, or the employees.

6. The employer in this case has clearly refused to continue to employ a number of its employees. However, as the above definition indicates this type of action would only constitute a lock-out if it were done with a view to compel or induce employees "to refrain from exercising any rights or privileges under (the) Act" or "to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer ... the trade union, or the employees".

7. There is nothing in the evidence which even suggests that the respondent was attempting to induce or compel employees to agree to any proposed changes in provisions respecting terms or conditions of employment or any rights, privileges or duties of the applicant, the respondent or the employees. Thus, if a lock-out did occur it must have been because the respondent was seeking to compel or induce employees to refrain from exercis-

ing any rights or privileges under the Act. An unlawful strike, however, is not such a right or privilege, but is in fact a form of conduct expressly prohibited by the Act. It follows from this that any disciplinary penalties imposed on employees solely in response to their involvement in the unlawful strike could not amount to a lock-out under the Act.

8. The Board recognizes that there may well be situations where an employer under the guise of imposing disciplinary penalties on employees is in fact seeking to compel or induce employees either to refrain from exercising any rights or privileges under the Act or to agree to certain employer proposals with respect to terms or conditions of employment. There is nothing in this case, however, to suggest that this might have been the respondent's true motive. Indeed, in his submissions the representative of the applicant pointed to no rights under the Act which the respondent might have been attempting to get employees to cease exercising nor did he refer to any terms or conditions of employment or any rights, privileges or duties which the respondent may have been seeking to introduce or alter. This being the case, the Board is satisfied that the actions of the respondent did not amount to a lock-out under the Act.

9. Having regard to the fact that the actions of the respondent being complained of did not come within the definition of a lock-out, it follows that the applicant is not entitled to relief under section 83 of the Act. It was for this reason that the Board dismissed the application at the hearing.

10. As the Board was careful to point out at the hearing, the Board's determination in this matter in no way addresses itself to the question as to whether or not the respondent had just cause under the collective agreement for imposing the disciplinary penalties which it did. Such a question can only be resolved through the grievance-arbitration procedures provided for in the collective agreement itself.

1186-77-R Canadian Chemical Workers Union, (Applicant), v. Druggist's Corporation Limited, (Respondent).

Certification – Employee – Whether employee who has not acted in a confidential capacity may be excluded because she might do so in the future.

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Russel Pratt and Daniel Ublansky for the applicant; Tim Sargeant, Fred B. Parker and Don Ford for the respondent.*

DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD, AND BOARD MEMBER O. HODGES; February 15, 1978.

1. The applicant has been certified under section 6 (1a) of The Labour Relations Act as bargaining agent for a unit of office and clerical employees. It remains for the Board to determine a dispute between the parties as to whether the person engaged as Confidential Secretary to the Manager, Ms. Susan McMahon, is employed in a confidential capacity in

matters relating to labour relations and, therefore, excluded under section 1(3)(b) of The Labour Relations Act.

2. The evidence contained in the Examiner's report establishes the following. The respondent is a wholly-owned subsidiary and the manufacturing division of Drug Trading Company Limited. It has approximately 60 employees and, while there is no evidence to this effect in the Examiner's report, the Board's records show that the same union has been certified for a unit of plant employees since March 24, 1976, displacing a predecessor bargaining agent of long standing. Negotiations with the union for the plant unit are conducted by industrial relations staff from the head office of Drug Trading Company Limited. As a result, the manager, Mr. Parker, who is the senior executive at the respondent's premises, has not experienced much involvement in labour relations matters until the present, having been limited to discussions and consultations concerning negotiations and an involvement with processing grievances when required, although he is not named to the grievance procedure in the collective agreement. For the same reason, Ms. McMahon has not been required to do any typing or other information processing with respect to confidential labour relations matters. However, there is a likelihood of future involvement, since Mr. Parker gave evidence that he is a member of the employer's bargaining committee for the new clerical unit and he expects to be involved as well in the grievance procedure. Ms. McMahon would be required to do his typing and other information processing with respect to these activities.

3. The law on exclusions under the "confidential" feature of section 1(3)(b) of the Act is clear and well established by many Board decisions which have held that, for a person to be excluded thus, he must be involved in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer; and the involvement must be part of the employer's regular duties and not a mere accidental or isolated occurrence. See *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379 at p. 388.

4. While the Board's jurisprudence does reflect some recognition of the need for managers whose jobs involve them in confidential labour relations matters to have secretarial assistance in those matters provided by a person who is excluded from the bargaining unit, it is based on evidence which demonstrates an actual involvement in labour relations matters prior to the application for certification, and not merely on an expected one after certification. See, for example, a recent unreported decision in the case of *The Regional Municipality of Haldimand-Norfolk (Norview Home for the Aged)*, Board File No. 2193-76-R (July 8, 1977), in which the Board said: "Discreet secretarial help is essential to any employer and that is manifestly so in matters of labour relations.". The Board's decision in that case was to exclude from a white-collar bargaining unit a person employed as a secretary-receptionist, but this was on clear evidence of her having been involved with typing and preparing confidential labour relations information. It might be argued that a situation could exist where the prospective need to be involved in labour relations matters would arise from the certification and before which event no need existed, thus disposing the Board to grant an exclusion. However, even that hypothesis does not fit the case to be decided here, because there has been an opportunity (by the presence of the plant unit) for involvement in confidential labour relations matters, but the respondent apparently has decided to meet the need in some other way. This confronts the Board with a less than convincing argument for ignoring its usual reluctance to decide these issues on the speculation of future involvement.

In the circumstances of this case, therefore, the Board concludes that the respondent has failed to demonstrate sufficient involvement in confidential labour relations matters to exclude from the bargaining unit the position of Confidential Secretary to the Manager. Therefore, the Board finds that Susan McMahon is not regularly employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act.

5. The composition of the bargaining unit is thus finally resolved. The Board accordingly finds that all office and clerical employees of the respondent at 795 Pharmacy Avenue, in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales staff and laboratory personnel, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. A formal certificate will now issue to the applicant.

DECISION OF BOARD MEMBER J. D. BELL:

1. I do not agree with the decision of the majority regarding the status of Susan McMahon.

2. This case is unique. Applicant unions do not usually question the need of the employer to have one person excluded from an office and clerical bargaining unit to perform secretarial duties in matters of labour relations for the senior executive of the employer.

3. The *Norview Home for the Aged* case (supra) is specific in stating "Discreet secretarial help is essential to any employer and that is manifestly so in matters of labour relations".

4. The prime purpose for excluding a person employed in a confidential capacity in matters relating to labour relations is to avoid a conflict of interest. This will not be accomplished in the case at hand if the senior executive of the employer who, as a member of the negotiating team will be involved in labour relations, has to depend on a member of the bargaining unit to type and otherwise assist him in the processing of confidential information relating to these matters.

5. In the interests of furthering a sound collective bargaining relationship between the parties I would find that the person described by the respondent as the confidential secretary to the manager is employed in a confidential capacity in matters relating to labour relations and is not an employee within the meaning of section 1(3)(b) of The Labour Relations Act.

1382-77-R Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **United Parcel Service Canada Ltd.**, (Respondent).

Certification – Build up – Effect of projected build up being contingent upon obtaining future licences and approval from regulating authority

BEFORE: M. G. Picher, Vice-Chairman and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *I. J. Thomson and Don Swait for the applicant; R. A. Werry and G. Smith for the respondent.*

DECISION OF THE BOARD; February 23, 1978.

1. The name: "United Parcel Service" appearing in the style of cause of this application as the name of the respondent is amended to read: "United Parcel Service Canada Ltd."
2. This is an application for certification. The applicant seeks bargaining rights for all employees of the respondent United Parcel Service Canada Ltd. (hereinafter referred to as U.P.S.) at London except dispatchers, persons above that rank, office and sales staff.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. U.P.S. is engaged in the business of parcel delivery within Ontario. At the hearing the parties agreed that this Board has constitutional jurisdiction in the instant case.
5. The respondent asks the Board to adjourn this application because of a projected build-up of its work force. Its present operation consists in the transportation and delivery of parcels weighing under 70 lbs. both within and between municipalities in Ontario. U.P.S. has acquired cartage licences to transport parcels by truck in a number of municipalities which have cartage by-laws and it also trucks parcels within municipalities with no cartage by-laws. It does not run trucks between the cities and towns in Ontario because it does not have the required Public Commercial Vehicle licence to do so. By the terms of The Highway Traffic Act, R.S.O. 1970, c. 202 (as amended) and The Public Commercial Vehicles Act, R.S.O. 1970, c. 375 (as amended) it may, and presently does, use passenger vehicles, namely checker-cab automobiles, to carry parcels between municipalities in Ontario. That limitation obviously restricts the scope of its operations.
6. According to the testimony of its president, Mr. Glendon C. Smith, it is the intention of U.P.S. to substantially expand its operations in Ontario. U.P.S. expects to eventually capture some 20% of the Ontario market which is now almost exclusively in the hands of the Post Office and a group of private carriers. Its ability to do that depends on two factors: firstly, it must succeed in its application for a Public Commercial Vehicle licence that would enable it, among other things, to run trucks to and from any point in Ontario south of Ken-

ora. Secondly, if the licence is granted, it must secure to itself that part of the market which it hopes to acquire.

7. The application of U.P.S. for its all-important Public Commercial Vehicle licence is presently pending before the Ontario Highway Transport Board. Its application was made in February of 1977 and the hearings before the Transport Board, which began in September of 1977, have been lengthy and complex. Those hearings are continuing at the present time and it is not anticipated that a decision on the licence application will issue before May of 1978. The respondent is confident that it will succeed in its application and that once it has its licence its business will mushroom. It sought to substantiate that outcome by adducing evidence of its own projections in respect of its share of the market and its related labour requirements if its license application succeeds.

8. It presently employs some 14 drivers in the London area, handling a portion of its province-wide business of 6,800 parcels per day. It anticipates that within 90 days of the granting of a province-wide Public Commercial Vehicle permit its combined local and inter-city trucking operations will result in a province-wide flow of 50,000 parcels per day. That, according to the respondent, would require some 88 drivers working in the London area, including Stratford and Sarnia, in addition to 12 more employees engaged in servicing and washing vehicles. According to Mr. Smith those figures are drawn from the respondent's own market survey and its employment experience in comparable markets in the United States.

9. The issue is whether this application for certification should be adjourned until a more representative work force is in place. In other words, should the Board delay the access of an existing group of employees to collective bargaining in order to preserve the right of an indeterminate group of future employees to participate in the selection of their collective bargaining agent? •

10. The Board will do that in any application for certification where it is established that the employer has a definite and firm plan to increase its work force within a reasonable period of time, and that there is a real likelihood that the build-up will take place. In that circumstance the employees at work at the time of application will in all likelihood not be representative of the work force that will in fact be employed. But it must be shown to the satisfaction of the Board that the build-up of the work force amounts to more than a mere possibility. The desire of the existing employees to exercise their right to immediate collective bargaining is not to be subordinated to mere chance. Moreover, if it appears that the build-up depends on factors that are beyond the control of the employer, so that the certainty of build-up is to that extent still more remote, the Board may decline to postpone consideration of the application before it. (See the *Emil Frant case* 57 CLLC ¶18,057; *Power Controls Division – Midland-Ross of Canada Limited* [1967] OLRB Rep. Mar. 954; *Regina ex rel. United Steelworkers of America v. Labour Relations Board (Sask.) and Noranda Mines Ltd.* (1970) 7 D.L.R. (3d) 1 (S.C.C.)).

11. When those principles are applied to the instant case the Board is satisfied that an adjournment should not be granted. The projected build-up of the respondent's work force depends on two things: its application for an inter-city trucking licence and (assuming the licence is granted) its subsequent success in the market place. The licence application is clearly a contingency outside the applicant's own control. Its success before the Ontario

Highway Transport Board depends entirely on the determination of that tribunal as to the "public necessity and convenience" of the granting of a Public Commercial Vehicle licence to U.P.S. (see section 5, The Public Commercial Vehicles Act, *supra*). No one can say at this time with any certainty what the outcome of the respondent's application will be, especially in view of the strenuous opposition to U.P.S.'s licence application before the Transport Board by a number of intervener carriers. Whatever may be the merit of the respondent's speculation as to its eventual success in the market, its competitive presence in the inter-city market will depend entirely on the uncertain outcome of its license application, something that is clearly not in its own hands. That is to say that the evidence does not satisfy the standard of certainty that must be met in order for this Board to postpone the instant application. The respondent's request for an adjournment is therefore denied.

12. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent working at London, Ontario save and except dispatchers, those above the rank of dispatcher, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 19, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

1053-77-M International Association of Machinists & Aerospace Workers
Local 1863, (Applicant), v. **Champion Road Machinery Limited**,
(Respondent).

Reference – Employee – Whether employees have power to make effective recommendation – Whether employees have independent decision making power.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *George Drennan, Clarence Taylor and Dave Sowerby for the applicant; John P. Sanderson Q.C., Byron Winsor and Chuck Reid for the respondent.*

DECISION OF THE BOARD; February 24, 1978.

1. The name "Dominion Road Machinery Co. Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Champion Road Machinery Limited."

2. This is an application under Section 95(2) of the Act. In a decision dated November 2, 1977 the Board appointed an Examiner to meet with the parties and inquire into the duties and responsibilities of those whose employee status was in dispute. A hearing was held on January 23, 1978 for the purpose of hearing representations as to the conclusions which the Board should draw from the information set-out in the report of the Labour Relations Officer.

3. The report of the Examiner reveals that the respondent sought leave of the Board to withdraw his challenge to the status of:

M. Ross	– Design Technologist
M. Bendig	– Design Technologist
T. Lileikis	– Engineering Processor
E. Marshall	– Engineering Processor

The Board hereby acknowledges the respondent's request and grants leave to withdraw in respect of the above named persons.

4. The Board hereby records the agreement of the parties that the evidence of Mr. V.J. Alexander and Mr. J.H. Jerry will stand for themselves and for all project engineers.

5. Section 1(3)(b) of the Act states:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

The purpose of the section is to ensure that the persons who are within a bargaining unit deemed appropriate for collective bargaining do not find themselves faced with a conflict of interest as between their responsibilities and obligations as persons who “exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations” and their responsibilities and obligations as members of the bargaining unit. The Board in examining the duties and responsibilities of the person(s) whose employee status is disputed must look to the potential conflict of interest, and having regard to the purpose of the section, exclude from the operation of the Act any person whose duties and responsibilities as of the date of the application would place them in such a position.

6. The Board jurisprudence with respect to the interpretation of section 1(3)(b) as it relates to persons “employed in a confidential capacity in matters relating to labour relations” has been capsulized in the *York University* case [1975] OLRB Rep. Dec. 945 at page 951:

“...That is to say the Board must be satisfied of ‘a regular, material involvement in matters relating to labour relations’ to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case OLRB M.R. September [1969] 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for

excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case OLRB M.R. April [1974] 220). Nor is mere knowledge of matters that may be deemed 'confidential' in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See, *The Comtech Group Limited* case OLRB M.R. May [1974] 291). The important test is whether there is consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employees' service to the employer's enterprise. (See *The Toledo Sale Division of Reliance Electric Limited* case OLRB M.R. June [1974] 406)."

The Board stated in the *Falconbridge* case [1966] OLRB Rep. Sept. at page 379 that an exclusion based on "confidential capacity" must follow from -

"...a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer..."

7. There is no evidence before it as would cause the Board to find that any of the 4 employees who were examined are employed in a "confidential capacity in matters relating to labour relations" as the phrase has been interpreted by the Board. Mr. Alexander referred to the costing and purchasing data, engineering information and process sheets to which he is privy as being confidential. He testified that it was confidential because the Board of Directors said so. Mr. Jerry referred to outside company projects and engineering data as confidential. Mr. Willey referred to the costing and estimating data to which he is privy as confidential. Mr. Everleigh testified that the pre-release engineering design information which he receives as part of his regular job duties is confidential. Whereas the information considered confidential by these employees may be confidential in the sense that the company does not want the information released within its organization or divulged to the public, it is not information which directly relates to labour relations. It is primarily technical data which is at best incidentally related to labour relations. In the result the Board must find that none of these four persons would be thrust into a conflict of interest situation if found to be an employee within the meaning of the Labour Relations Act. These employees are not exposed in a material way to confidential information in matters relating to labour relations and accordingly, they are not employed in a confidential capacity within the meaning of Section 1(3)(b) of the Act.

8. The Act does not set out the criteria to be considered by the Board in making a determination as to managerial function within the meaning of Section 1(3)(b) of the Act. The Board, having regard to the purpose of the section, has recognized that the exercise of managerial function may assume a number of different forms, each of which must be individually assessed. The Board considered the appropriate criteria to be applied in determining if technical experts such as process or industrial engineers exercise managerial function in the *Inglis Limited* case, [1976] OLRB Rep. June 270. In the *Inglis* decision the Board distinguished between the technical expert whose job function directly relates to employee relations and the technical expert whose job function does not. The Board drew this distinction at para. 9 of the [*Inglis*] decision wherein it stated:

"Is the criteria one of independent decision making or is it one of effective

recommendation? The Board has seen fit to apply the test of effective recommendation to persons engaged in the supervision of others (paragraph 6 herein) because a person engaged in supervision who makes effective recommendations as regards terms and conditions of employment would be compromised if placed within a bargaining unit of other employees. Similarly, a technical expert or mid-management person who makes effective recommendation (of the type contemplated in the *Algoma Steel* case, supra) with respect to terms and conditions of employment should likewise be excluded. A confusion arises when the test of effective recommendation is applied to technical experts or middle management personnel whose functions are distinct and apart from employee relations. In the *Hydro* case, supra, the Board was dealing with two types of technical experts; the work study technician whose expertise related to conditions of employment, and public relations persons whose expertise was in areas distinct and apart from employee relations. The Board applied the test of independent decision making as recounted in paragraph 8 herein to both the work study technicians and the public relations personnel and did not distinguish between the two. A proper application of the section, however, requires that a distinction be drawn. A person who is engaged in a function which does not have a direct bearing on conditions of employment should not be excluded from the Act unless he is charged with independent decision making responsibility as that term has been used by the Board. The making of effective recommendations which can have no effect on terms and conditions of employment does not place a person in a conflict of interest situation vis a vis labour relations and is not sufficient, therefore, to cause a person to be excluded from the operation of the Act. The Canada Labour Board was recently asked to decide whether all employees of the marketing department of the B.C. Telephone Company save and except the Vice-President of Marketing and his executive secretary were employees within the meaning of Section 107(1) of the Canada Labour Code, which is a similar section to 1(3)(b) of the Ontario Act.

(See *British Columbia Telephone Co.* case, Board File 555-360, February 26, 1976). The Canada Board was definite in rejecting the "effective recommendation" criteria and aptly stated at page 38 of that decision:

'In many large enterprises, the tasks of preparing the documentation which will be a key input in the decision-making process or of ensuring that a decision is being effectively implemented have been entrusted to highly skilled white-collar employees or to professionals. Often, these persons are known as "managers." But the importance of the role of these "knowledge workers," as the applicant calls them, does not detract from the fact that their role is that of a worker or "employee" and not that of a manager.

The existence of a power to recommend instead of a power to decide is often a key indicator of the nature of the role played by a person or a group or persons in an enterprise. It is not just a question of semantics but a means of ascertaining where the real authority and responsibility lie. In such a context, the originator of a recommendation simply pro-

vides an input into the actual decision. The fact that the recommendations are generally effective does not mean that the focus of the decision-making process has somehow been displaced. It is a reflection of the fact that the author of the recommendation does a good job and it might have much to do with whether or not he is likely to ever become a decision maker, but it does not change the nature of his job which is essentially that of a subordinate, however highly skilled.'

In answer to the question raised at the outset of this paragraph the Board states that persons engaged in a function with little or no impact on employee relations must be judged to be managerial on the basis of independent decision making responsibility, whereas persons who make 'effective recommendations' which can effect the employment relationship must be judged on the basis of these recommendations to also exercise managerial functions within the meaning of section 1(3)(b) of the Act."

The Board has defined an "effective recommendation" as a serious recommendation which the evidence demonstrates is usually acted upon and therefore a recommendation that materially affects the economic lives of employees." (See *McIntyre Porcupine* case, [1975] OLRB Rep. April 261.

9. Following the rationale set out above the Board found in the *Inglis* case that those in the classifications buyer, customs agent, product engineer, and time study analyst were employees within the meaning of the Act. The Board found that those in the classification process engineer, exercised managerial function and were not, therefore, employees within the meaning of the Act. On the basis of written recommendations dealing with manufacturing processes which made specific reference to a reduction in manpower and to evidence which established that decisions had been taken in respect of these recommendations, the Board found that the process engineers exercised managerial function within the meaning of the Act. They had a power of "effective recommendation" in matters directly related to employee relations.

10. None of the four persons who gave evidence in the instant case have the authority to hire, fire, discipline, grant time off or make assessments of employee performance as would affect promotion or wage increases. Notwithstanding the fact that there is some general supervision of clerical or stenographic staff, none of these four persons have direct authority over the employment relationship of other persons as would cause the Board to find that they exercise managerial function.

11. None of the four persons who gave evidence enjoy a power of independent decision making as would cause the Board to find that they exercise managerial function. It is clear from the evidence that both the project engineers and the industrial engineers undertake independent investigation and feasibility studies and that they make recommendations on the basis of their professional evaluation. There is no evidence, however, to suggest that they have an independent decision-making authority. The decision-making in respect of the projects and studies to which they are assigned is made by those higher in the organization.

12. On the evidence before it the Board finds that neither the project engineers nor the industrial engineers enjoy a power of "effective recommendation on matters which can

affect the employment relationship of other employees. Mr. Jerry, a process engineer, is engaged in part and assembly studies and is presently reviewing transmission and transmission component designs. He answered in the affirmative when asked if his function is "to improve the quality of the grader or the performance of the grader." Mr. Alexander, also a project engineer (in consultation with a consulting engineer) is involved in a feasibility study of a proposed new plant which has resulted or will result in recommendations as to plant lay-out, machinery selections and manpower requirements. There is no evidence upon which to conclude that Mr. Alexander, independent of the consulting engineer, determines the optimum manpower level or that his recommendations in this regard have ever or will ever be acted upon. There is no evidence that either Mr. Jerry or Mr. Alexander have ever made recommendations which have resulted in the lay-off of employees or the phasing out of existing jobs as did the process engineers in the *Inglis* case (supra). Whereas the project engineers are highly skilled technical experts they are not employed in a managerial capacity within the meaning of the Act.

13. The industrial engineers are similarly engaged in complex technical projects. Mr. Willey described his primary responsibilities as relating to paper flow and tool ordering. He also made reference to his involvement in lesser projects having to do with the use of torque guns on the assembly line and the painting of the graders. Mr. Everleigh described his four principal areas of involvement as time study, methods of organization, lay-out and material handling. He testified that he is presently engaged in "a special assignment to clarify the computer with regards to the parts involved in the complete assembly of the grader." As with the project engineers, there is no evidence to suggest that the industrial engineers enjoy a power of "effective recommendation" in matters relating to the employment relationship of other employees. They too are highly skilled and competent technical experts whose primary areas of responsibility do not directly affect the employment relationship of other employees. In the absence of independent decision making authority, therefore, it must be found that they do not perform in a managerial capacity within the meaning of the Act.

14. It is the determination of this Board that both the project engineers and industrial engineers are employees for purposes of the Labour Relations Act.

1826-76-R Graduate Assistant's Association, (Applicant), v. Carleton University, (Respondent), v. Carleton University Support Staff Association, (Intervener).

Certification – Bargaining Unit – Whether teaching assistants and research assistants are employees – Whether separate bargaining units appropriate for graduate and undergraduate teaching assistants

BEFORE: M. G. Picher, Vice-Chairman and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *James Hayes, Elizabeth Lennon, Theresa Acton, Brigid Hayes and Charles Barrett for the applicant; Ms. Janice A. Baker for the respondent; no one appearing for the intervener.*

DECISION OF THE BOARD: February 3, 1978.

1. This is an application for certification in which a pre-hearing representation vote was taken.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. Following the taking of the vote the ballot box was sealed pending a final determination of the bargaining unit. The applicant seeks bargaining rights for all employees of the respondent in Ottawa employed as teaching assistants, demonstrators, part-time lecturers, markers and teachers who are undergraduate students, or graduate students in the Faculty of Graduate Studies of Carleton University. The respondent, Carleton University, resists the application and objects to the bargaining unit proposed by the applicant. Firstly, it maintains that the teaching assistants, demonstrators, part-time lecturers, markers and teachers who are themselves students of the University are not employees for the purposes of The Labour Relations Act. Alternatively, it submits that if they are employees the bargaining unit should also include students who are employed as research assistants. Lastly, it submits that separate bargaining units should be established for graduate and undergraduate students.
4. The Board has had the benefit of a lengthy report of the Labour Relations Officer and the submissions of the respective parties on that report. Some ten students, both graduates and undergraduates, were examined as well as eight members of the faculty and administration of the University.
5. Carleton University has some 9,000 full-time students and approximately 7,000 students enrolled on a part-time basis. It has approximately 500 full-time faculty members in addition to a number of part-time faculty members who are not students. The University is organized into four basic faculties: Arts, Science, Engineering and Social Science. Graduate work performed in each of the faculties is under the further supervision and administration of a fifth faculty, the Faculty Of Graduate Studies and Research. There are some 30 departments or schools within the faculties, each with a chairman or department head. Each of the faculties is headed by a Dean who reports to the Vice-President in charge of academic affairs.
6. The University is funded in a number of ways. Principally it derives its funds from the Government of Ontario according to enrolment, on a "basic income unit" formula. It also obtains funds from tuition and other fees paid by its students, from grants given by individuals and by institutions both private and public, and from the income on the funds in its own accumulated endowment.
7. There are some 926 student teaching assistants and research assistants at Carleton. They are paid principally out of the operating funds of the University. It is the responsibility of the Dean of each faculty to draft the budget of each of the departments or schools within the faculty. In so doing the Deans allocate not only the global sum for the budget of each department, but determine specific amounts allocated to the various categories within each department budget. The amount to be set aside for hiring sessional lecturers, some of whom may be graduate students, is thus decided upon by the Dean. The amount allocated

to the hiring of teaching or research assistants is determined by the Dean of the faculty in consultation with the Dean of Graduate Studies. Research assistants may also be funded directly out of private research grants awarded to departments or to individual faculty members.

8. From the evidence it appears that the flow of funds is no different whether graduate or undergraduate students are employed. When a department has need of an assistant and its budget allocation in that respect is unexpended because it cannot find a suitable graduate student, an undergraduate may be chosen by the same process of application and selection. Generally applications for assistantships are processed at the department level. Academic merit is the normal basis for selection, and it is also a factor in determining the level of remuneration of the particular applicant.

9. Against that background we turn to deal firstly with the employment status of teaching assistants and research assistants. It should be noted that for the purposes of this decision the principles canvassed and the conclusions arrived at in respect of students classified as teaching assistants and research assistants are equally applicable to students who are classified as part-time or sessional lecturers, service assistants, demonstrators and markers. The terms designating the last three categories appear to be interchangeable with the term "teaching assistant" and it is not disputed that all of the students within these categories are remunerated for work related to teaching and research within the University.

10. Persons and institutions may obviously stand in more than one relationship to each other. Thus there is nothing inherently contradictory in the notion that an individual within a university may at once be a student and an employee of that institution. The fact that the work done as employee may complement and enhance the work done as student or, conversely, that the work done as student may qualify the person to also function as an employee does not change that. It cannot be doubted that the students in question are paid to perform services under the direction of the University and for its benefit.

11. Teaching assistants may carry a significant part of the work load in a given course. In a course containing three teaching hours a week they may lead a discussion group of from 15 to 30 students during one of the three hours. In addition to the time required for preparation of the discussion group they keep office hours of 1 or 2 hours per week on a regular basis as well as deal with the inquiries of students that may come outside of those hours. It is not unusual for teaching assistants to be responsible for from 25% to 50% of the final mark in a course and, indeed, a large part of their time may be devoted to the preparation, proctoring, and marking of tests, examinations and papers.

12. In a history course their work can involve weekly discussions of material contained in the lectures of the instructor or in the assigned readings. In an economics course it might involve instructing students in the doing of assigned problems in an area like statistics, and marking problems that the students are required to submit. In sciences such as biology and geology teaching assistants are largely employed as laboratory demonstrators: in that capacity they may give a brief lecture at the outset of a lab period, be involved in the physical preparation of apparatus, the supervision of laboratory work by the students and the marking of examinations and lab reports. Generally a teaching assistant or research assistant will devote approximately 10 hours per week to his or her work assignment.

13. Counsel for the University submits that the students in question should not be characterized as employees because, although they may be useful, they are not absolutely necessary to the functioning of the University. That argument misconceives the nature of the Board's inquiry. We must take the respondent's institution as we find it: the fact is that at the present time Carlton University is in large measure dependent upon the performance of a wide variety of academic tasks by students who are paid for that purpose and selected on the basis of academic merit. The suggestion that the University might be reduced to large classes lectured to by a handful of renaissance men is neither here nor there for the purposes of defining the employment status of those who function within the existing reality.

14. Student assistants perform work that is in essence the work of the University in both teaching and research. They are remunerated for their work and the quantity of their remuneration relates to the amount of work they do and to their academic qualifications. While it is obvious, as the University argues, that the granting of assistantships has an important role to play in attracting good students to Carleton, that fact does not change the nature of the employment relationship that is created when the student accepts the offer of an assistantship. Work permits from Canada Manpower are required for all foreign students engaged in assistantships. In addition income tax, unemployment insurance premiums and Canada Pension Plan premiums are deducted from the payments made by the University to all of its student teaching assistants and research assistants. It is, moreover, a requirement of the University itself, as outlined in a memorandum dated January 5, 1976, from the President to the Academic Deans, that, in keeping with provincial government policy, the payment of teaching assistants be strictly on the basis of work performed. Lastly, it is noteworthy that a number of persons who are not students are employed by the University as both research assistants and teaching assistants. That is further evidence that the work performed by assistants who are students transcends their status as students and brings them into an employment relationship. Having regard to all of the evidence the Board finds that students employed as teaching assistants and research assistants by Carleton University are employees of that institution for the purposes of the Labour Relations Act.

15. We turn to the question of the exclusion of undergraduates from the bargaining unit. According to the agreed list there are some 183 undergraduate and some 743 graduate students employed. There are two issues here: firstly, whether there is a community of interest between graduate and undergraduate students for the purposes of their employment relations with the University and secondly, whether the severing of a group of undergraduates would cause an artificial fragmentation of the student employees that would be deleterious to sound collective bargaining. In assessing community of interest the Board examines five elements: (1) the nature of work performed; (2) conditions of employment; (3) skills of employees; (4) administration and (5) geographic circumstances. (See the *Usarco* case [1967] OLRB Rep. Sept. 526). In the instant case there is commonality between graduate and undergraduate students with respect to all five elements. Undergraduates work within the same structures and are chosen by the same procedures as graduates; they perform the same work, often in teams with graduates, within the same courses, under the same supervision and subject to the same formula for remuneration. In our view the separation of these two groups for collective bargaining purposes would lead to an unnecessary duplication of bargaining and unduly weaken the presence of both groups at the bargaining table. There is nothing in the evidence to suggest that the interests of either graduates or undergraduates will not be fully represented and protected within a common bargaining structure. By the

same token the presence of a single bargaining unit will simplify and facilitate the task of the University both in bargaining and in administering any future collective agreement.

16. The final issue is whether, as the University maintains, research assistants should be included in the bargaining unit along with teaching assistants. This Board must recognize that in light of the functions it performs the modern university is more than merely a teaching and degree-granting institution. Universities are dedicated to the advancement of knowledge and, in various ways, to the enrichment of the community at large. Thus it is not uncommon for universities to be engaged in the operation of museums, galleries and the maintenance of archives and historical collections whose purposes extend beyond the education of their own students. Likewise they are involved in the sponsorship of public symposia and the presentation of lectures, films, concerts and dramatic productions for the benefit of the public.

17. Universities also foster many forms of research in the arts, humanities, social sciences as well as in the pure and applied sciences. Much of that research will relate in varying degrees to the course content and degree work of graduate and undergraduate students; some of it, on the other hand, will be almost entirely within the personal scholarship of individual professors or within the particular project of a group of professors, of a department, of a faculty, or of a separate research institute within the university. Research may be funded by and done in conjunction with private enterprise, a philanthropic foundation or a government agency such as the Canada Council or the National Research Council. Although many research projects may bear little or no relationship to the courses and curriculum offered by a university, they are nonetheless an inherent part of its function. It would, in our view, be unrealistic to maintain that students employed by the University to do research are not its employees merely because their work does not directly relate to teaching.

18. The applicant submits that research assistants should be excluded from the bargaining unit on the basis of the Board's decision in *York University* [1975] OLRB Rep. Sept. 683. In that case the Board found that students described as graduate assistants at York University were not employees for the purposes of The Labour Relations Act because their assistantships were virtually unrelated to work performed. Those students were, in effect, the beneficiaries of scholarships or bursaries in the guise of assistantships. In the instant case the evidence does not show that the students engaged as research assistants at Carleton are in the same situation. For the reasons described above and having regard to all of the evidence, we find that they stand clearly in the relation of employees to the University. There is, moreover, nothing in the circumstances of their employment to suggest that they should be isolated in a separate bargaining unit.

19. The Board therefore finds that all employees of the respondent in Ottawa employed as teaching assistants, demonstrators, part-time or sessional lecturers, markers, research assistants or associates, and service assistants, who are graduate students enrolled in the Faculty of Graduate Studies or undergraduate students at Carleton University, excluding employees covered by collective agreements with Canadian Guards' Association, Local 103; C.U.P.E., Local 910; I.U.O.E., Local 796; Graphic Arts International Union, Local 224, the Carleton University Support Staff Association and the Carleton University Academic Staff Association, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. The Registrar is instructed to proceed to the counting of the ballots cast. All ballots cast by persons within the voting constituency described in paragraph 4 of the Order of the Board dated February 24, 1977, will be counted.

0286-77-U Graduate Assistants' Association, (Complainant), v. Carleton University, (Respondent).

S79 – Whether decision to alter working conditions must be communicated to employees prior to the onset of the section 70 freeze – Whether change of working conditions

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members N. B. Satterfield and D. B. Archer.

APPEARANCES: *James Hayes and Marion Malcolmson for the complainant; Janice A. Baker and Gilles Paquet for the respondent.*

DECISION OF THE BOARD; February 13, 1978.

1. This is an application under section 79 of the Labour Relations Act. The union alleges that the respondent, Carleton University, has violated section 70(2) of the Act which reads as follows:

“Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.”

2. An application for certification was filed by the union on January 28, 1977. Notice of the application for certification was sent to the respondent by the Board on January 31, 1977. We may presume, therefore, that the respondent received notice of this application some few days later or approximately February 3, 1977.

3. Pursuant to the provisions of section 70(2), a freeze of the employment relationship took effect on or about February 3, 1977 between Carleton University and the graduate assistants. The union alleges that the respondent violated this freeze in April, 1977 by altering the manner in which financial assistance was offered to graduate assistants. Mr. Paquet, the Dean of Graduate Studies and Research concedes that in April, 1977 the letters received by the graduate assistants offering them financial assistance for the coming year revealed a new system of financial rewards instituted by the respondent.

4. Having regard to all the evidence submitted by the parties, the Board finds that the alteration in the award system as reflected by the letters sent from the Faculty of Graduate Studies in April 1977 may be summarized as follows:

- a) In April 1977, the graduate students were offered a lump sum award from the Faculty of Graduate Studies instead of the two separate awards which had been offered in previous years: one, a scholarship from the Faculty of Graduate Studies and the other, an assistantship from the student's individual department.
- b) The full lump sum award was made conditional on the performance of employment responsibilities, unlike the previous system where one award, the scholarship, was not conditional on the performance of such duties.
- c) Under the combined award system the students were not given work options from which they could choose the number of hours they wanted to work each week. The evidence discloses that under the previous scheme some departments provided the students with various work options.
- d) Because acceptance of the most frequently offered awards was conditional on a firm intention to remain at Carleton for a twelve-month period rather than any shorter term, and because the award was further conditional on the performance of assisting responsibilities, the new scheme raised the possibility that students would no longer be free, as they were before, to seek outside employment during the spring term.
- e) Finally, because the award covers a twelve-month period, unlike the usual assistantship under the previous scheme, it would appear that a student could no longer apply to his particular department for an additional award in the spring of each year as was the previous practice.

5. The Board is satisfied that the alteration of the awards scheme, as described above, constitutes an alteration in conditions of employment within the meaning of section 70(2) of the Act. The question remains, however, as to whether the alteration is caught by the section 70(2) freeze.

6. The evidence shows that while the university made the final decision to alter its financial awards system in December, 1976 or over a month before the notice of the application for certification was received by the respondent, the decision was not communicated to either the union or the graduate students prior to April, 1977 or for several months following the onset of the freeze period. While there is no doubt that the employer's policy decision evidences an unequivocal intention to alter the terms of employment, it could have been revoked or altered prior to its implementation if the employer had wished to do so. The issue then, is whether the existence of this intention is sufficient to avoid the prohibition on altering working conditions found in section 70(2).

7. Counsel for the respondent argued that it was not necessary for the university to inform the employees of its decision to alter its awards system prior to the onset of the freeze period in order to escape the freeze. Counsel argued that the key element was that the decision to make the alteration was made prior to the respondent's receipt of the notice of the application for certification. Counsel for the union, on the other hand, argued that to prevent the operation of the freeze period it was absolutely necessary for the respondent to communicate its decision to make a future alteration of the conditions of employment prior to the onset of the freeze period.

8. In defining the parameters of the freeze period, the Board has consistently stated that the freeze does not apply to alterations in conditions of employment that have been put into motion prior to the onset of the freeze period. For example, the Board in *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049 adopted at p.1054 the following passage from a decision of the British Columbia Supreme Court in *Caseso Consultants Limited*; Vancouver Registry No. 2223/68:

"The notice [of termination of employment] by the defendant was given before the plaintiff union had given its notice to commence bargaining and it would appear to me from the wording of the Act that the prohibition in section 18(b) applies to things actually and actively done after notice to commence collective (bargaining/sic) has been given, and not to things that happen or are meant to happen after that notice is given *by reason of having been put in motion before the period of prohibition has set in.*"

(emphasis added)

For a recent application of this principle, see the Board's decision in *Nel-Gor Castle Nursing Home*, (File No. 0423-77-R, decision dated January 11, 1978) where the Board found that the freeze period had not been violated because the grievor was discharged through the operation of an understanding that had been reached between the employee and the employer prior to the onset of the freeze period.

9. Although the general principle that the freeze period does not encompass matters that have been set into motion prior to the onset of the prohibition is well established by the Board's jurisprudence, it is less clear whether a decision made prior to the onset of the freeze period has to have been communicated to the other party to prevent the operation of the freeze.

10. Although the Board has not made a clear statement on this point, a review of the cases indicates that in almost every case where the Board has found that there has been no violation of the freeze period because the alteration in the conditions of employment had been set into motion before the onset of the prohibition, the decision to make the alteration was communicated to the other party prior to the onset of the freeze period.

11. In both *Scarborough Centenary* (supra) and *Kiddie Togs*, 1965, CLLC ¶ 14,040, a Quebec Court of Queen's Bench decision cited in *Scarborough*, the employers advised the employees at the commencement of their employment, i.e., well before the onset of the freeze period, that they would be receiving fixed annual increments. More recently, in the Board's decision in *Hostess Foods Products Ltd.*, [1975] OLRB Rep. Mar. 210, the Board

found that the respondent had violated the freeze period by failing to implement a wage increase that had been put into motion in accordance with the respondent's past practice and had been communicated to the employees prior to the onset of the period of prohibition. In *Cranbrook and District Hospital Society*, 68 CLLC ¶ 14,145, a British Columbia Supreme Court decision cited by this Board in *Scarborough*, the employees were informed approximately one week prior to the onset of the freeze period that the employer would be altering the conditions of their employment in view of the fact that it had just made a contract with a third party to provide housekeeping services within its new hospital. In *City Parking Canada Limited*, [1968] OLRB Rep. Jan. 1038, the respondent implemented a new system under which parking lot attendants would handle cash. As a result of the change in the method of handling cash, the respondent's insurance company insisted upon bonding requirements for the parking lot attendants. The insurance company set in motion the machinery to effect the bonding of the attendants including having them complete applications for bonding. In concluding that the respondent had not altered conditions of employment within the meaning of section 59(1), now section 70(1), of the Act, the Board stated that although it was not clear from the evidence exactly when the applications were circulated among the attendants, it was clear that this was done prior to the giving of notice to bargain. By having filled out the applications, the attendants were made aware of the impending change prior to the onset of the freeze.

12. While the relevant facts in some of the Board's cases are less explicit than in the cases cited above, they may also be seen as supporting the principle that the decision to alter conditions must have been communicated to the employees before the onset of the freeze period. In *Parr's Print and Litho Ltd.*, [1973] OLRB Rep. Nov. 597, the employer altered its hours of work on an experimental basis prior to the application for certification and notice to bargain. During the ensuing freeze period, however, the employer reverted back to its original hours. The Board held that the employer's alteration of the hours of work during the freeze period was not a violation of either section 70(1) or section 70(2) because the alteration was made in accordance with a "predetermined scheme". Although the original conditions of the alteration of working hours were not set out in the decision, one might assume that the experimental, i.e., potentially temporary, nature of the change was known to the employees before the freeze since the change was made at their request. In *Fielding Lumber Company Limited*, [1971] OLRB Rep. Mar. 162, the Board found that there was no violation of the freeze period because, "the evidence establishe[d] that the introduction of the stacker was a thing put into motion before the period of prohibition set out in the section and [was], therefore, not caught by the section". Although it is not apparent on the face of this brief decision whether or not the introduction of the stacker was something that had been communicated to the employees prior to the onset of the freeze period, the Board relied on *Scarborough Centenary Hospital* and the cases cited therein for support of its decision. As set out above, in all of those cases the decision to alter working conditions was communicated to the employees prior to the onset of the freeze period. Accordingly, the Board views *Fielding Lumber* as consistent with the rest of the Board's cases.

13. In view of the above cases we are satisfied that the Board's jurisprudence overwhelmingly supports the principle that to avoid the application of the freeze, a decision to alter conditions of employment must have been communicated to the other party prior to the onset of the freeze period.

14. Moreover, the purpose of imposing a freeze period underscores the conclusion

that this interpretation of the scope of the freeze period is the most appropriate. Through the combined operation of section 70(1) and section 70(2) of the Act, the Act imposes a continuous freeze on working conditions from the time the employer receives notice of an application for certification through the giving of notice under section 13 or section 45 and until either certain specified events occur after the Minister's appointment of a conciliation officer or mediator under the Act or until the right of a trade union to represent the employees has been terminated. With respect to the freeze imposed by section 70(1) following the giving of notice to bargain under either section 13 or section 45 of the Act, the Board has consistently stated that the purpose of the freeze period at this time is to maintain the status quo of the wages and other terms and conditions of employment so that the union is given an opportunity to enter negotiations and bargain for a collective agreement from a fixed point of departure and in an atmosphere of industrial relations security that is undisturbed by alterations in conditions of employment (see the Board's decisions in *Canron Ltd., Eastern Structural Division*, [1976] OLRB Rep. Aug. 436, *Industrial Wire & Cable Company*, [1977] OLRB Rep. June 385, and *Kodak Company Limited*, [1977] OLRB Rep. Feb. 49). In a similar vein the Board has stated that the purpose of the freeze in section 70(2) following the application for certification is to provide a period of some stabilization and tranquility during which the union may seek to obtain bargaining rights on behalf of the employees in the absence of disturbances emanating from alterations in conditions of employment between the employees and the employer (see *Kodak Canada Limited*, supra, *Beaver Electronics Limited*, [1974] OLRB Rep. Mar. 120, and *Molson Brewery*, [1977] OLRB Rep. Aug. 526).

15. If it were open to an employer to alter conditions of employment during the freeze period by virtue of having made the decision to do so prior to the freeze, notwithstanding that the employees had not been informed of the intended change until after the onset of the freeze, the desired period of stability and tranquility in the employment relationship following notice to bargain or an application for certification would be jeopardized. It is no less disturbing to an employee to be first informed during the freeze period of an alteration of his conditions of employment simply because the decision to make such an alteration had been made by management prior to the onset of the freeze period. To secure for the union a period of relative stability by maintaining the status quo, it is essential to eliminate unexpected changes for employees during the freeze period.

16. Having regard, therefore, to the thrust of the Board's jurisprudence and the purpose of the section 70(2) freeze, the Board is of the view that for an employer to sidestep the parameters of the freeze period by setting into motion prior to the freeze period an alteration of conditions of employment to take effect after the onset of the freeze period, the employer must have communicated the intended alteration to the employees prior to the onset of the freeze period.

17. In the instant case, Carleton University did not inform the graduate assistants, prior to the onset of the freeze period, that it would be altering the manner in which financial assistance would be given to the graduate students.

18. The Board, therefore, finds that the respondent acted in breach of section 70(2) of the Act. Because of the lapse of time and intervening circumstances, the Board declines at this time to order a remedy. We leave it to the parties to work out the most appropriate remedy. The Board remains seized of this case, however, and in the event that the parties are unable to work out an appropriate resolution, the Board will order a remedy based on representations made to it at that time.

1601-77-R Trizec Equities Ltd. (Security Guards), (Applicant), v. International Union, United Plant Guard Workers of America, Local 1962, (Respondent), v. **Trizec Equities Ltd.**, (Intervener).

Termination – Whether trade union has failed to exercise its bargaining rights – Effect of Board discretion.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members F.W. Murray and P.J. O’Keeffe.

APPEARANCES: *William Probert and George Dory for the applicant; Nancy Goodman and W.E. Cook for the respondent; David A. Suckling for the intervener.*

DECISION OF THE BOARD; February 17, 1978.

1. The name “International Union United Plant Guards of America” appearing in the style of cause of this application as the name of the respondent is amended to read: “International Union, United Plant Guard Workers of America, Local 1962.”

2. This is an application brought under Section 51(1) of the Act by a group of employees seeking to have the respondent union’s bargaining rights terminated. The parties are agreed that the application is timely in that 60 days have elapsed since the union was certified on October 31, 1977. The respondent union admits that formal written notice to bargain in accord with Article 13 of the Act, was not served on the employer within the stipulated 60 day period following certification.

3. Section 51(1) of the Act provides:

“If a trade union fails to give the employer notice under section 13 within sixty days following certification or if it fails to give notice under section 45 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.”

When this section is read in conjunction with section 49(1) of the Act the purpose of section 51(1) becomes clear. Section 49(1) of the Act allows a trade union a period of one year from the date of its certification to conclude a collective agreement during which time it is protected by statute from having its bargaining rights terminated upon application of an employee in the bargaining unit. Section 51(1) allows either the employer or any of the employees to apply to have the bargaining rights terminated but only upon failure of the union to serve formal notice to bargain. The purpose of section 51(1) of the Act is to protect both the employer and the employees from a union which, after certification, sleeps on its bargaining rights. A union which sleeps on its rights may have those rights terminated short of 1 year from certification. The jurisprudence of the Board in respect of the purpose of the section and the exercise of the discretion which it confers upon the Board is capsulized in *Nurses Association St. Mary’s General Hospital, Kitchener, Ontario*, [1971] OLRB Rep. Sept. 556, wherein at para 7 the Board stated:

"The principles covering the issuance of a declaration in these circumstances appear to be succinctly set forth in the *Graham Transport Limited* case, OLRB, M.R. May 1968, p. 184 at page 185, as follows:

'While it is at the discretion of the parties whether notice is given under section 40 of the Act, failure to do so by a trade union gives rise to the right of an employer or employees to bring an application to the Board under section 45 of the Act. Section 45(1) of the Act however, does not confer a 'right' upon the applicant other than the right to make an application. The relief sought by the applicant is at the discretion of the Board and before the Board will exercise its discretion in favour of an applicant it must be satisfied that the trade union has failed to take steps within a reasonable time to forward the interests of those employees it represents. See the *Moyer Sand* case, O.L.R.B., Monthly Report, March 1966, p. 913. The Board in a number of cases has considered the circumstances in which it would exercise its discretion provided for in section 45, and had stated that the decisions relating to section 45(2) are relevant in the consideration of cases arising under section 45(1). See the *Grant Ready Mix Limited* case, O.L.R.B. Monthly Report, December 1967, at page 892. A statement as to the purpose of section 45 has been set out in the *Dominion Stores Limited* case CCH Canadian Labour Law Reporter 1955-59 Transfer Binder 16,047:

The purpose of section 43 [now section 45] of the Act is to protect the employees and, in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section 43 should not be used to penalize a union which has failed to give notice under section 10 [now section 11] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously'."

4. The evidence before the Board establishes that Mr. W.E. Cook, the President of the Amalgamated Plant Guards, Local 1962, the bargaining agent, contacted the company in mid December (within the 60 day period) to arrange for a date to commence bargaining. It is agreed that the company suggested the matter be put over until after Christmas and that a date be set in January. The evidence establishes that Mr. Cook was negotiating with the intervener company for a unit of guards employed at the Yorkdale Plaza. Mr. Cook testified that he was of a mind that the Yorkdale negotiations, which were not completed until February 3, 1978, would set the pattern for the collective agreement covering the guards at the Scarborough Town Centre (those covered by the instant certificate) and as a result he saw no reason to commence to negotiate before Christmas. Mr. Cook candidly admitted to the Board that he was not aware of the requirements of Section 13 in respect of formal written notice.

5. There are 6 employees in the instant bargaining unit. Mr. Cook contacted Mr. Geo. Dory, a bargaining unit employee whom he described as an "unofficial representative" after agreeing to postpone negotiations and informed him of this development and as well indicated that the Yorkdale settlement would probably set the settlement pattern. Mr. Dory testified that he asked Mr. Cook to draft a proposed agreement which could be shown to the guards at Scarborough Town Centre for their approval. Mr. Dory testified that Mr. Cook said he would do so before Christmas. Mr. Cook was under the impression that the information he had given to Mr. Dory would be relayed by him to the other members of the bargaining unit and, while Mr. Dory did not occupy any official capacity, the Board is satisfied that he did report to the other employees. The evidence also establishes that Mr. Cook informed Mr. Esterguard, another bargaining unit employee, at a Yorkdale Christmas party and during the course of a telephone conversation on January 2, of the A.I.B. restraints and the Yorkdale pattern. Mr. Cook did not provide the members of the bargaining unit with the written proposals as he had promised to do.

6. A petition in support of a termination application was circulated on January 18, 1978 and the application was filed on January 20, 1978. Mr. Cook had contacted the company on January 16 and had met with representatives of the company on January 17. Formal bargaining proposals were not given to the company until January 20, the date of the instant application.

7. The Board has reviewed the evidence in light of the purpose of section 51(1) of the Act, the section under which this application has been brought, as set out in paragraph 4 herein. The 6 bargaining unit employees work rotating shifts which perhaps in part explains Mr. Cook's decision to communicate through Mr. Dory. The fact remains, however, that Mr. Cook did not communicate with anyone in the bargaining unit for a 6 week period following certification and could give no satisfactory explanation as to why he had failed to do so. Whatever may be said about the union's failure to adequately communicate, however, the evidence does not establish that the union has abandoned or is sleeping on its bargaining rights. Mr. Cook was negotiating the Yorkdale agreement with the company during the relevant period. He had contacted the company in mid December and again in mid January with respect to the Scarborough Town Centre negotiations and formal proposals were filed on January 20, 1978. The Board accepts that Mr. Cook was unaware of section 13 and it was for this reason that he failed to satisfy its simple requirement. In the result, and notwithstanding the failure of the union to serve notice, the Board is satisfied that the union has not slept on its rights and accordingly, it is the decision of the Board not to exercise its discretion under section 51(1) of the Act and terminate the respondent's bargaining rights.

1215-77-U Oscar Larocque, (Complainant), v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915, and **Foster Wheeler Limited**, (Respondents).

Duty of Fair Representation – Whether union conduct respecting employee layoff and ad-

ministration of hiring hall is arbitrary discriminatory or in bad faith.

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *William Minifie appearing for the complainant; Henry Pollit appearing for Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915; and Tom Manley appearing for Foster Wheeler Limited.*

DECISION OF THE BOARD: February 8, 1978.

1. The complainant has complained to the Board that Oscar Larocque, Fraser Campbell and Brian Beavais (the "grievors") have been dealt with by the Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915 ("Local 915"), contrary to the provisions of sections 60 and 60a of The Labour Relations Act and requested that an order be granted reinstating the grievors in employment with compensation for loss of earnings and other employment benefits.

2. More specifically the complainant alleged that on or about October 5, 1977, the grievors were dealt with by Luigi Fanelli, the business agent of Local 915, and Gino Roncone, union steward of Local 915, contrary to the provisions of sections 60 and 60a of The Labour Relations Act in that they did on their own behalf, or on behalf of Local 915:

act in an arbitrary and discriminatory manner and in bad faith exercise of their power of "selection, referral assignment, designation or scheduling of persons to employment" under a collective agreement, in causing the discharge of the grievors from their employment. On or about October 4, 1977, the grievors had a disagreement with the walking foreman on the job site, John Boccanfusa, with respect to the latter doing their work. The grievors, all cement masons, were discharged on or about October 5, 1977. The stated reason for their discharge was a "reduction in force". No complaint was made at that time or earlier, with respect to the grievors' work. On or about October 10, 1977, the grievors became aware that five new cement masons were hired to replace them. The grievors were not asked, before the new employees were hired, whether they wanted to resume their jobs. The grievors spoke to the business agent on October 6, 1977, with respect to their complaint. They were informed that the reason for their discharge was simply a reduction in force.

3. At the commencement of the hearing, the parties agreed on the relevant collective agreements which were in force at the time of this complaint. The parties also agreed that the three grievors were members of Local 915 at all relevant times, that the lay off occurred on October 5, 1977, when the grievors were working for Foster Wheeler Limited ("Foster"). The parties also agreed that the hiring hall procedure was in effect within Local 915 and that Local 915 maintained a list of members who were seeking work. It was agreed that when called there was an obligation on Local 915 to send persons at the top of the list and that when a person reported that he had been laid off he would go to the bottom of the list and slowly work his way up.

4. The evidence established that the grievors had had arguments with Mr. Boccanfusa, the walking foreman, when he attempted to show them how certain work should be performed. The grievors have comparatively little experience as cement masons. It should be noted that the three grievors were not engaged in any formal apprenticeship training programme for cement masons. They were learning the trade of cement mason by on the job experience. At the time of the hearing Mr. Campbell had had about two years of experience as a cement mason, Mr. Larocque had had about one and a half years of experience as a cement mason and Mr. Beauvais had had about six months of actual work as a cement mason. Mr. Campbell, the most experienced of the grievors, testified that he is still learning the trade and that it takes about twenty years to be a good cement mason.

5. The complainant bases his complaint on a chain of events – the arguments with Mr. Boccanfusa; remarks about their being required to finish certain work by October 4 and the fact that they did not finish this work; other employees who were sleeping on the job (although such employees were not observed by Foster's supervision); Peter Hecimovich's poor attendance record, the alleged existence of between one and a half and two years' work on Foster's project; the alleged hostility of Mr. Boccanfusa towards them and the successful communication of such alleged hostility to the general foreman, Dominic Ferrara, who made the decision to lay them off in response to Mr. Boccanfusa's alleged hostility towards them; the failure of Mr. Fanelli and Mr. Roncone to obtain their reinstatement as cement masons with Foster; and the failure of Local 915 through Mr. Fanelli to refer them to other employment as cement masons.

6. The evidence establishes that there were arguments about Mr. Boccanfusa's using the tools from time to time. However, after hearing the evidence I am satisfied that the grievors assumed that their own strong feelings on the subject engendered a correspondingly strong reaction by Mr. Boccanfusa. I am satisfied that the latter was solely interested in performing his job and that it was his responsibility to see that the work was being performed in a proper manner and at a satisfactory rate. I find on the balance of probabilities that Mr. Boccanfusa did not harbour strong feelings about the arguments and that he did not communicate his feelings about the grievors to Mr. Ferrara. There is no evidence before me that the grievors were in any way held responsible for their inability to finish certain work by October 4, 1977. The failure of Foster's management to observe certain employees who were sleeping during working hours is not relevant to this complaint. Foster can hardly be faulted for not acting upon a state of affairs of which it was ignorant.

7. Mr. Hecimovich gave evidence about his attendance record as a cement mason with Foster. I find that his absences from his employment were due to his son's medical appointments and that Foster accepted this as the reason for his absences upon receipt of a letter from his son's physician. I find that Mr. Hecimovich was not accorded any preferential treatment which would have not also have been available to the grievors in similar circumstances.

8. There is no doubt that Foster still has work to complete at the project. However, the uncontradicted evidence of James Baldwin, the area superintendent for Foster, establishes that on October 4, 1977, the cement masons employed by Foster were reaching a stage where they were catching up with the carpenters and were consequently running out of work. In other words, there are peaks and valleys in Foster's day to day requirements for cement masons and the work force does not proceed with the work at the project without contractions and expansions in Foster's scheduling arrangements.

9. The evidence of Mr. Baldwin establishes that Foster's management personnel have manpower meetings twice a week and that on October 4, 1977, Mr. Baldwin instructed Mr. Ferrara to cut back the cement masons by three men. He gave Mr. Ferrara the discretion to decide which three cement masons should be laid off. Mr. Baldwin testified that on these occasions cement masons may be laid off even though the particular area where they are working requires further work.

10. Mr. Ferrara informed the Board that on October 4, 1977, he received his instructions from Mr. Baldwin to lay off three cement masons. He gave evidence that he made his choice without discussing the matter with anyone and that he was unaware of any arguments between the grievors and Mr. Boccanfusa. He testified that it was not unusual for a walking foreman to use the tools and that he based his decision of who to lay off on the basis of who works and who does not. He explained that he did not ask Foster for information on the three grievors and that the length of current employment with Foster did not really matter when he was making any decision about who to lay off. He stressed in his testimony that it was his practice to retain the better tradesmen. Mr. Ferrara informed the Board that Foster expects the production and that the cement masons he retained on October 4, 1977, were the better tradesmen in that they were more experienced. There was no evidence before the Board which in any way contradicted Mr. Ferrara's evidence. I found him to be a credible witness and I find that he selected the three grievors for lay off based solely upon considerations of their work. I hasten to add, however, that there is no suggestion in any of the testimony that any of the grievors either did not produce at a satisfactory level or exercise adequate skills in the trade of cement masonry. It was simply a question that on October 4, 1977, Mr. Ferrara was instructed to lay off three cement masons on October 5, 1977, and that based upon his own observations he reached the conclusion that the three grievors were less productive and less skilled than the other twenty-five cement masons who were employed by Foster.

11. Mr. Roncone's failing in the eyes of the grievors was that he did not agree with them that they were being "pushed too much", that he delivered their lay-off notices to them and that he took no action upon their being laid off. There is no evidence that any of the grievors complained to Mr. Roncone about being laid off on October 5, 1977. In fact they rushed to Mr. Fanelli and complained to him. The grievors, in their testimony "felt" that Messrs. Roncone and Fanelli knew about their lay offs and had something to do with it. A mere feeling is not sufficient to impugn the conduct of any person under The Labour Relations Act. There is not a shred of evidence before the Board that Messrs. Roncone and Fanelli knew about the lay offs before they occurred or had anything to do with the lay offs.

12. Shortly after October 5, 1977, Mr. Fanelli met with the grievors in his home and required each of them to fill out a grievance form. He promptly investigated their lay offs and advised them that there was nothing he could do because they did not have a valid grievance. After they were laid off the names of the grievors were added, in accordance with the usual practice of Local 915, to the bottom of the list of the members who were seeking employment.

13. On October 11, 1977, Foster requested and was supplied with five additional cement masons from Local 915. None of the grievors was among these five additional cement masons. The evidence before the Board establishes that Foster has previously laid off and hired greater numbers of cement masons during May of 1977. I find nothing sinister or even

puzzling that the scheduling of work for cement masons in the construction industry involves variations in the work force from week to week or even from day to day. Such variations are the very facts of life in the construction industry. The grievors were not referred to work with Foster on October 11, 1977, because they were not at the top of the list of members of Local 915 who were seeking work as cement masons.

14. Mr. Fanelli referred each of the three grievors to a succession of jobs as cement masons after October 5, 1977. Admittedly, these jobs were not of any appreciable duration. However, there was nothing before the Board to suggest that they were treated any differently from any other members of Local 915. Two of the grievors even had reservations about accepting employment to which Local 915 had referred them. Mr. Larocque was referred for work to Canadian Bechtel on October 28, 1977. He worked there at double time rates on the following weekend and then succeeded in having himself laid off so that he could collect unemployment insurance. Mr. Beauvais testified that he declined a job which Local 915 had referred to him in December of 1977 because it would interfere with his entitlement to be paid unemployment insurance. The three grievors were referred to several jobs by Local 915 through the efforts of Mr. Fanelli.

15. Under the terms of the collective agreement between The Sarnia Construction Association and Local 915 which is binding on Foster, there is no restriction on the use of tools by a walking foreman and under article 10 Foster has the right, *inter alia*, to lay off employees and to operate and manage its business in accordance with its commitments and responsibilities.

16. In the *United Association of Plumbers & Steamfitters Local 221* case, [1974] OLRB Rep. 366, 370, the Board stated:

17. Since the introduction of a provision into the Act dealing with the violation by a trade union of its duty of fair representation the Board has accumulated some experience in applying standards of conduct consistent with the discharge of that duty. The Board has indicated that "in an inquiry under section 60 we are not primarily engaged in a consideration of the merits of the complainant's case as between the complainant and the company. The duty of the Board under the section is to carry out an examination of the conduct of the Union throughout the matter in order to ascertain whether it has acted in a manner that is arbitrary, discriminatory or in bad faith in its representation of the complainant. The Board is therefore concerned as to whether the decision of the union was made in good faith and not with the question as to whether the Board would have reached the same or some other decision on the merits of the original dispute between the parties. (see: *Essex International of Canada Limited Case* OLRB M.R. January 1972, 104). And in determining whether a union has acted in manner it chooses to treat employee complaints the Board has stated that "we do not consider the duty of fair representation requires a union to blindly carry every grievance through to arbitration at the demand of the grievor." (see: *The Dorothy Ellens Case* OLRB M.R. August 1972, 770). Indeed, "a union fulfills its duty under section 60 so long as in reaching its decision not to process a grievance, it does not act in a manner that

is arbitrary, discriminatory or in bad faith.” (see: *The Sal Messina Case* OLRB M.R. July 1972, 719). And in applying a standard owed employees by a trade union the Board has indicated that “the duty ... does not require the Board to assess the quality of representation in an abstract way. The Board need only determine whether the union has represented all employees in the bargaining unit in the same manner The standards of a professional advocate cannot be imposed upon the union officials who were involved ... they are not professional advocates or lawyers and accordingly the duty of care is not the same as that imposed on lawyers.” (see: *Rutherford’s Dairy Limited* OLRB M.R. March 1972, 240). Elaboration of this theme was expressed by the Board in another case where it stated “... we recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. The Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence nor is the standard based on what the Board may have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions the norms of the industrial community and the measures and solutions that have gained acceptance within the community.” (see: *The Ford Motor Company of Canada Limited Case* OLRB M.R. October 1973, 519). Thus the crucial question in determining whether a trade union has discharged its statutory obligation and responsibility is whether that trade union “... has represented the interests of all employees fairly and impartially and without hostility.” (see: *Rutherford’s Dairy Limited Case* [supra]).

17. On the basis of all the representations before it, the Board finds that Local 915 and its officers have not acted in a manner that is arbitrary, discriminatory or in bad faith with respect to any of the grievors. The Board finds that there has not been a violation of section 60. The loss of employment by the grievors with Foster no doubt caused feelings of anger and frustration. Foster in the legitimate exercise of its rights to manage its business and to schedule the work of its cement masons decided to reduce the number of cement masons by three on October 4, 1977. The gist of the grievors’ complaint under section 60 is that three of their fellow members rather than themselves should have been laid off. There is no provision for regard to seniority in the collective agreement and the lack of such a provision is by no means uncommon in the construction industry.

18. With respect to section 60a, the Board finds that Local 915 and its officers followed the usual and equitable method of placing the names of the grievors at the bottom of the list of members who were seeking work. Moreover, the grievors were referred to other employment shortly after their names were placed on the list. Indeed, the efforts of Local 915 to find employment for Mr. Larocque and Mr. Beauvais were not always fully appreciated and accepted. There was nothing in the evidence before me which indicated that Local 915 acted in a manner that was arbitrary, discriminatory or in bad faith in the selection, re-

ferral, assignment designation or scheduling of any of the grievors to employment. The Board finds that there has not been a violation of section 60a by Local 915 and its officers.

19. It appears to the Board that the three grievors are unwilling to accept that Mr. Ferrara on behalf of Foster might make a decision with respect to their employment in which he preferred twenty-five other members of Local 915 over the three grievors. It further appears that they have recently entered the trade of cement masonry at a time when cement masons were in great demand in the area around Sarnia. When the supply of work which is available to cement masons begins to diminish it may well be that cement masons of less experience will discover that there is a decrease in the work which will be available to them. In filing this complaint Mr. Larocque desires the privileges of membership in Local 915 but is unable to appreciate that there are responsibilities between the members of Local 915. There is an equitable method of sharing the work which is available and where, through reasons beyond the control of Local 915, Foster adheres to its preferred method of scheduling work there is no cause for complaint against Local 915, its officers or Foster.

20. There was reference in the evidence to the use of foul language by one of the grievors to Mr. Fanelli, to an allegation by one of the grievors that Mr. Fanelli was engaged in racial discrimination against them and threats to bring the Ministry of Labour against Mr. Fanelli. These references to racial discrimination were not relied upon by the complainant in this complaint. The Board hastens to add that there was nothing in the evidence which in any way indicated Mr. Fanelli engaged in racial discrimination against any of the grievors. On the other hand there was evidence which indicated that Mr. Fanelli lost his temper with the grievors when faced with foul language, allegations of racial discrimination and threats to bring the Ministry of Labour against him. He reacted angrily when he contemplated the cost of retaining counsel and defending what he considered to be their groundless complaints against Local 915, himself and Mr. Roncone. Mr. Fanelli threatened "to get them" and throw them out of Local 915. There is nothing to indicate that he either "got them" or in any way altered their status as members of Local 915. The references in this paragraph, in my view, are correctly considered as not forming part of this complaint and represent nothing more than hurtful remarks which were cast in the heat of very emotional arguments.

21. For the foregoing reasons this complaint is dismissed.

1434-77-M Haldimand-Norfolk Regional Health Unit, (Employer), v. Ontario Nurses' Association, (Trade Union).

Reference – Whether Minister has authority to appoint an interest arbitrator when procedure adopted does not comply with section 34c.

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *M.H. Gordon and D.K. Gray for the employer; J.B. Noonan and Maureen O'Halloran for the trade union.*

DECISION OF THE BOARD; February 17, 1978.

1. This is a reference under section 96 of the *Labour Relations Act*. The question referred to the Board is whether the Minister has authority under the Act to make such appointments as are necessary to constitute a board of arbitration.
2. At this point it should be made clear that the board of arbitration in question is one that would resolve the collective bargaining differences of the parties. This form of arbitration, commonly called interest arbitration, must be distinguished from what is called rights arbitration. Interest arbitration is simply a means of resolving collective bargaining impasses by having outstanding matters in dispute determined by an arbitrator, or board of arbitration. By contrast, the procedure of rights arbitration only comes into play once the negotiations have produced a collective agreement. At that stage any differences arising from the interpretation, application, or administration of that collective agreement, by force of section 37 of the *Labour Relations Act*, are required to be resolved by the process of rights arbitration, or grievance arbitration. The importance of this latter procedure becomes apparent in the light of the prohibition in section 63 of the Act, barring resort to strike and lock-out action during the operation of a collective agreement.
3. The facts in this matter are not in dispute. The employer and trade union were parties to a collective agreement made pursuant to an award of an interest arbitration board. That collective agreement provided for a term of operation from January 1, 1976 to December 31, 1976. In a letter dated November 23, 1976, the trade union served the employer with notice to bargain for a new collective agreement. The parties met and bargained but were unable to reach a new collective agreement. A conciliation officer was appointed but the impasse continued. The parties were informed by the Ministry, on October 24, 1977, that the conciliation officer had been unable to effect a collective agreement.
4. The trade union, on October 12, 1977, twelve days before being informed by the Ministry of the conciliator's lack of success, wrote to the employer concerning notice to arbitrate, and naming its nominee to the board of arbitration. The employer's response was set out in a letter of October 31, 1977, in which it stated through counsel that it did not intend to nominate a representative to a board of arbitration, and that it would challenge the authority of the Minister to appoint a nominee for the employer in the event that such action was requested by the employer. A request was made by the trade union, on November 9, 1977, and in reply the employer through counsel indicated its continued refusal to appoint, and set out the arguments in support of this position. The letter concluded by asking that "this letter be treated as a request that the question of the Minister's entitlement to make an appointment under section 34c, in the circumstances of this case, be referred to the Ontario Labour Relations Board pursuant to the provisions of section 96 of the *Labour Relations Act*, Ontario". In a letter dated December 2, 1977, the union indicated that it agreed to having this matter referred to this Board under section 96 of the *Labour Relations Act*.
5. A detailed procedure for interest arbitration is provided in article 16 of the collective agreement referred to earlier. Apparently, this provision had been voluntarily agreed to by the parties and had been included in the last four or five collective agreements between the parties. The employer's challenge to the validity of the provision was first communicated to the union in the fall of 1977. Article 16 reads:

ARTICLE 16 – INTEREST ARBITRATION

- 16.01 In the event that either of the parties elects under Article 18 to terminate, modify or amend this Agreement and should the parties be unsuccessful in negotiating a new agreement on or before the 15th day prior to the expiry date of this Agreement, either of the parties may notify the other in writing of its desire to submit to arbitration the negotiation of a new Agreement and the notice shall contain the name of the first party's appointee to an Arbitration board. The recipient of the notice shall within five (5) days advise the other party of the name of its appointee to the arbitration board.
- 16.02 The two (2) appointees so selected shall appoint within five (5) days of the appointment of the second nominee a third person who shall be Chairman. If the recipient of the notice fails to appoint an arbitrator or if the two (2) appointees fail to agree upon a Chairman, the appointment shall be made in either event by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall herein determine the new collective agreement and shall issue a decision and the decision shall be final and binding upon the parties. The decision of the majority shall be the decision of the arbitration board, but if there is no majority the decision of the Chairman shall govern.
- 16.03 No person may be appointed as an arbitrator who has been involved in an attempt to negotiate the collective agreement in issue. Each of the parties shall bear the expense of the arbitrator appointed by or for it and the parties shall share equally the expenses of the Chairman, if any.
- 16.04 At any stage of the arbitration the conferring parties may have the assistance of any and all necessary witnesses.
- 16.05 All time limits mentioned in this article may be extended by agreement between the parties.
- 16.06 When the three (3) members have been appointed to the board of arbitration, it shall be presumed conclusively that it has been established in accordance with this Agreement, and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise, to question the establishment of the board or the appointment of any of its members, or to review, prohibit or restrain any of its proceedings.
- 16.07 If a person ceases to be a member of the board of arbitration by reason of his resignation, death or otherwise before it has completed its work, the party whose point of view was represented by such person shall within five (5) days appoint a new member in

his place provided that if the Chairman is unable to carry out his duties a new chairman shall be appointed in accordance with the provisions of this article within five (5) days of his withdrawing.

- 16.08 The board of arbitration shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions and if the members of the board are unable to agree on matters of procedure or as to the admissibility of evidence, the decision of the Chairman shall govern.
- 16.09 The decision of the majority of the members of the board of arbitration is the decision of the Chairman, but, if there is no majority the decision of the Chairman shall be the decision of the board.
- 16.10 The Chairman and the other members of the board of arbitration established pursuant to this article have, respectively, all the powers of a Chairman and the members of the board of arbitration under The Labour Relations Act R.S.O. 1971 C. 232 and amendments thereto.
- 16.11 The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide on any matters that come within the jurisdiction of the Ontario Labour Relations Board.
- 16.12 The board of arbitration shall remain seized of and deal with all matters in dispute between the parties until the collective agreement is in effect between the parties.
- 16.13 Where, during the bargaining under this clause or during the proceedings before this board of arbitration, the parties agree on all matters to be included in the collective agreement, they shall put them in writing and shall execute the document and thereupon it constitutes a collective agreement under The Labour Relations Act. Provided that if the parties or either of them fail to execute any document within the time as is fixed by the board of arbitration the board may order that the document be in effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under The Labour Relations Act effective from the day upon which the order was made.
- 16.14 The provisions of this collective agreement shall remain in full force and effect beyond the expiry date of this collective agreement until such date as the decision of the board of arbitration amends or alters its provisions. The board of arbitration shall

provide that the Agreement or any of its terms shall be retroactive to such day as the board may fix but not earlier than the day upon which the previous agreement ceased to operate.

6. There is no doubt that in this case the union by its notice to arbitrate had attempted to trigger the interest arbitration procedure provided in the collective agreement. Whether the union had failed to comply with the procedure for invoking interest arbitration, as argued by counsel for the employer, is not for us to decide. This type of objection is one that can only be resolved by interpreting the collective agreement itself and, therefore, it should be left to a board of arbitration to be dealt with as a preliminary objection going to the arbitrability of the matter. When advising the Minister under section 96 as to whether to constitute a board of arbitration, the Board's role is to determine whether the parties are required, either because of the existence of a collective agreement or by operation of the Act itself, to resolve their differences through resort to the arbitration process. The question for the Board to decide is whether the process in general must be used by the parties to resolve their differences, and not whether a particular difference is one falling within the scope of the collective agreement. The latter question is one that can be resolved by simply interpreting a collective agreement, an exercise that should be left to an arbitrator, or board of arbitration. In this case, it is quite clear that the terms of the collective agreement between the parties, including article 16, had been continued by operation of section 70(1) of the *Labour Relations Act* and were in force at the time at which the union served its notice to arbitrate. The arbitration process, therefore, was available to the parties and the more particular question of whether the union had complied with the procedures set out in article 16 is one that must be answered by resort to that arbitration process.

7. The agreement to arbitrate in this case clearly has been made within the framework of a collective agreement. Does this agreement, however, fall within the scope of section 34c of the *Labour Relations Act*? That section reads:

34c. – (1) Notwithstanding any other provision of this Act, the parties may at any time following the giving of notice of desire to bargain under section 13 or 45, irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator or a board of arbitration for final and binding determination.

(2) The agreement to arbitrate shall supersede all other dispute settlement provisions of this Act, including those provisions relating to conciliation, mediation, strike and lock-out, and the provisions of subsections 6, 7, 9, 10 and 11 of section 37 apply *mutatis mutandis* to the proceedings before the arbitrator or board of arbitration and to its decision under this section.

(3) For the purposes of section 53 and section 112, an irrevocable agreement in writing referred to in subsection 1 shall have the same effect as a collective agreement.

8. What appears to be contemplated in these provisions is that the agreement to arbitrate be made after notice to bargain has been given. In this case, although article 16 continued to operate after notice to bargain was given, it is difficult to characterize the situation

as one where the parties have agreed to interest arbitration following the giving of notice, as argued by counsel for the union. The parties, in fact, had agreed upon this procedure well before notice to bargain was given, such agreement forming an integral part of the existing collective agreement. The mere fact that this agreement continued in force after the notice to bargain given on November 23, 1976, cannot lead to the conclusion that the agreement itself was reached after that time. The agreement to arbitrate in this case, therefore, cannot be said to fall within the scope of section 34c.

9. This conclusion, however, does not leave the agreement to arbitrate in a legal vacuum. Section 34c is directed at those agreements to arbitrate made during negotiations and for the purpose of resolving any outstanding matters arising out of those negotiations, providing such arrangements with a legal structure which did not exist prior to its enactment. Agreements to arbitrate contained within a collective agreement are on a different legal footing, being governed by the same legal regime as the collective agreement itself. The agreement to arbitrate, therefore, can be enforced in the same way as any other provision in the collective agreement.

10. What we have in this case is a term of a collective agreement, article 16, giving either party to the agreement the option of having any outstanding disputes arising out of their next round of negotiations resolved by binding arbitration. A complete procedure for such arbitration, including a provision for appointment of the board by the Minister of Labour in the event of a failure to appoint, is set out in that article. The problem here is that one of the parties, the employer, has challenged the validity of these agreed-upon procedures and has refused to appoint its representative to the board of arbitration. The question is not one of the extent of the Minister's authority to appoint under section 37(4) but, rather, her contractual authority to appoint under the terms of the collective agreement.

11. The nature of the question poses this difficulty. Section 37(4), in our view, applies only to rights arbitration and not to interest arbitration. Section 37 as a whole deals only with grievance arbitration, providing for the arbitration of differences arising from "the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable". Viewed in this context, subsection 4 must be treated as referring only to situations where there has been a failure to appoint a rights arbitrator, or board of arbitration. The question before us, therefore, is not one that falls within our advisory jurisdiction under section 96.

12. Our concerns about our lack of jurisdiction were conveyed to the parties at the hearing and discussed at some length. Both parties, however, indicated that they wished the Board to express its views about the validity of the interest arbitration provision in their collective agreement. The issue itself, moreover, is one of some general interest in the field of public health, and one that could arise before the Board in some other way, such as by means of an application alleging a violation of section 70. Given these considerations, we do not think it improper to give our opinion on the legal validity of the interest arbitration provision now before us.

13. The employer's main objection to this provision rested upon its potential to continue in perpetuity. The employer argued that in order to regain what was termed the right to lock-out, it would be necessary to obtain either the agreement of the union or, lacking such agreement, a favourable ruling by an interest arbitration board. Either event, in the

view of the employer, is unlikely, leaving it perpetually bound by a dispute resolution procedure that ran against the grain of the *Labour Relations Act*, since it contemplates the ultimate resolution of collective bargaining disputes through a method other than strike or lock-out action. Given this incompatibility, it was argued that the Board should treat the interest arbitration provision as a nullity. As authority for this approach, counsel referred to *Pigott Construction Company Limited*, [1969] OLRB Rep. May 399; *Belmont Plastering Company Ltd.*, [1970] OLRB Rep. Mar. 1459; *King Paving and Materials Division of the Flintkote Company of Canada Ltd.*, [1976] OLRB Rep. June 291; and *Nelson Crushed Stone, A Division of King Paving and Materials, A Division of the Flintkote Company of Canada Ltd.*, Board File No. 1054-77-U. These cases all dealt with the issue of whether parties to a collective agreement may contract out of the prohibitions in the *Labour Relations Act* against strike and lock-out action during certain stages of the collective bargaining relationship. The clear principle that emerges from these cases is that the parties to a collective agreement cannot in their agreement legitimate conduct that would otherwise constitute an illegal strike or lock-out under the *Labour Relations Act*.

14. Does this principle have any application to a provision that provides an alternative to strike or lock-out action? An affirmative answer to this question depends upon reading into the legislation an absolute requirement that the parties resort to economic sanctions in order to resolve collective bargaining impasses. If strike or lock-out action is an absolute requirement at a certain stage in the collective bargaining relationship, then it follows that the Board should treat any attempt to contract out of this requirement as a nullity. The question, however, is whether there is any absolute requirement that collective bargaining impasses be resolved by strike or lock-out action.

15. The scheme of the Act, in our view, does not require that resort to economic sanction be the exclusive method of impasse resolution. What the Act expressly restricts is the timing of the strike and lock-out action, permitting, but not requiring, the application of economic sanctions outside these parameters. See sections 36, 63, 65, 67. By contrast, the Act does not in any way expressly restrict the use of interest arbitration as a method of impasse resolution. Voluntary interest arbitration agreed to outside the framework of a collective agreement, in fact, is expressly recognized in section 34c of the Act, indicating that the Legislature did not intend that strike and lock-out action was to enjoy a monopoly as an impasse resolution procedure.

16. The express provision in section 34c for this one form of interest arbitration, according to counsel for the employer, indicated that it was the only form of interest arbitration permitted by the scheme of the Act. According to this argument, section 34c, because it avoids the problem of a procedure for interest arbitration continuing in perpetuity, was intended by the Legislature to be the sole procedure for arbitration of interest disputes. For two reasons this argument is less than convincing. First, we are not convinced that it is impossible for parties who wish to provide for interest arbitration in a collective agreement to draft language which would prevent the provision from continuing from agreement to agreement. Second, we are not persuaded that, in this type of case where the language of the collective agreement does not restrict the continuation of the interest arbitration procedure in subsequent agreements, it is impossible for the parties to negotiate themselves out of this procedure, or for an arbitrator to decide that the procedure should not remain as a term or condition of the new collective agreement.

17. The employer's argument appears to assume that the procedure for interest arbitration will always be regarded favourably by the union and, therefore, never become the subject of a collective bargaining trade-off. Industrial relations is too fluid for us to adopt this general assumption. Collective bargaining approaches are altered to meet changing circumstances, a fact which is evidenced by the conduct of this employer. During a number of negotiations, the employer made no objection to the collective agreement providing for interest arbitration, but now it appears that it has come to regard this procedure in a more favourable light and has raised its objections. Future circumstances might dictate another shift in attitude on the part of the employer, and perhaps also on the part of the union. Given these possibilities, we are not convinced that at some point the parties could not bargain themselves out of the procedure.

18. Also we are not convinced that interest arbitrators would never eliminate the interest arbitration procedure. The future implications for the parties of this method of dispute resolution is obviously a factor of some importance and one that should be taken into account by an interest arbitrator when resolving the outstanding matters in dispute between the parties. There is no evidence before us to support any assumption that an arbitrator would not consider the implications for the parties of continuing the interest arbitration provision.

19. Having regard to these considerations, our advisory opinion is that the scheme of the Act does not restrict recourse to voluntary interest arbitration, and that the particular procedure for interest arbitration agreed to by the parties in their collective agreement cannot be treated as a nullity.

CASE LISTINGS JANUARY 1978

	Page
1. Applications	
(a) Bargaining Agents Certified	17
(b) Applications Dismissed	26
(c) Applications Withdrawn	27
2. Application under Section 1(4)	28
3. Application under the Employees Health & Safety Act	28
4. Applications for Declaration Terminating Bargaining Rights	28
5. Application for Declaration of Successor Status	30
6. Applications for Declaration that Strike Unlawful	30
7. Applications for Consent to Prosecute	30
8. Complaints under Section 79 (Unfair Labour Practice)	30
9. Applications for Consent to Early Termination of Collective Agreement	33
10. Applications under Section 55	33
11. Applications for Determination under Section 95(2)	33
12. References to Board Pursuant to Section 96	33
13. Applications under Section 112a	34
14. Applications for Reconsideration of Board's Decision	35

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1978

BARGAINING AGENTS CERTIFIED DURING JANUARY

No Vote Conducted

1138-77-R: The Staff Association of the Children's Aid Society of Metropolitan Toronto (Applicant) v. Children's Aid Society of Metropolitan Toronto (Respondent).

Unit: "all employees of the Children's Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto save and except Department Heads/Executive Director and persons above the rank of Department Head/Executive Director, Assistant Property Manager, Personnel Officers, Planning Analysts, Secretaries to the Executive Director, Secretary to the Executive Assistant, Secretary to the Assistant Executive Director, Secretary to the Director of Planning and Development, Secretaries to the Branch Director, Secretary to the Director of Personnel and Training, Secretaries - Personnel, and Secretary to the Labour Relations Manager, Social Work Supervisors, Child Care Supervisors, Office Supervisor in finance and administrative services, Volunteer Supervisor/Co-ordinator, Maintenance Superintendent, Training Officer, Health Service Co-ordinator Foster Parents Association, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (6 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – See Report of full decision [1978] OLRB Rep. January).

0089-77-R: Retail Clerks, Local 206, Chartered by the Retail Clerks International Association (Applicant) v. Sunnybrook Food Markets (Keele) Limited (Respondent).

Unit: "all employees of the respondent at its retail stores in Metropolitan Toronto, save and except assistant store managers, persons above the rank of assistant store manager and persons covered by an existing collective agreement." (19 employees in the unit).

0207-77-R: The Canadian Union of Public Employees (Applicant) v. The Prescott and Russell County Roman Catholic Separate School Board Le Conseil Des Ecoles Catholiques De Prescott-Russell (Respondent) v. Group of Employees (Objectors).

Unit: "all non-teaching employees of the respondent employed in the counties of Prescott and Russell save and except all administrative staff working on Board premises at 500 Principale Est, 482 Principale Est, 565 Principale Est and on Front Road in Hawkesbury, library aides, teaching aides engaged in library work, foremen, those above the rank of foreman and persons employed for not more than 24 hours per week." (88 employees in the unit).

0662-77-R: Ontario Public Services Employees Union (Applicant) v. Hamilton Medical Laboratories (Respondent).

Unit: "all employees of the respondent working at or out of the Hamilton Medical Laboratories at Hamilton, Ontario, save and except section heads and those above the rank of section head, laboratory manager and students employed during the school vacation period." (33 employees in the unit).

0664-77-R: Ontario Public Service Employees Union (Applicant) v. Canadian Medical Laboratories Limited (Simcoe County Medical Laboratory – A Division of C.M.L.) (Respondent).

Unit: “all employees of the respondent working at or out of the County Medical Laboratory at Simcoe, Ontario, save and except the laboratory manager and those above the rank of laboratory manager, officer supervisor (manager), and students employed during the school vacation period.” (25 employees in the unit).

0800-77-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Gilcar Supervision and Management Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in the unit).

0810-77-R: United Rubber, Cork, Linoleum & Plastic Workers of America AFL-CIO-CLC (Applicant) v. Pal -O- Pak Manufacturing Company Limited (Respondent).

Unit: “all employees of the Respondent Company at Lindsay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (24 employees in the unit).

0897-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. 353521 Ontario Ltd., o/a Koil Construction Co. (Respondent) v. Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0923-77-R: The Ontario Erectors Association (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 759 (Respondent).

Unit: “all employers of ironworkers for whom the respondent has bargaining rights in the Districts of Kenora, Kenora Patricia, Rainy River, Thunder Bay and all that area lying to the north of the 50th degree latitude in the District of Cochrane and east to the Quebec boundary in the industrial, commercial and institutional sector and in the heavy engineering sector of the construction industry.” (employers in the unit). (*clarity note* – see Report of full decision [1978] OLRB Rep. January).

0980-77-R: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cochrane-Dunlop Limited (Respondent).

Unit #1: “all employees of the respondent working at or out of 1385 Bloor St. W. in Metropolitan Toronto, save and except Supervisors, Foreman, those above the rank of supervisor and Foreman, Office Staff, Sales Staff, Employees regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent working at or out of 50 Woodbine Downs Blvd. in Metropolitan Toronto, save and except supervisors, foremen, those above the rank of supervisor and

foreman, Office Staff, Sales Staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (67 employees in the unit).

1013-77-R: Service Employees International Union, Local 183, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Lennox and Addington County General Hospital (Respondent).

Unit: “all employees of the Lennox and Addington County General Hospital, Napanee, Ontario, save and except professional medical Staff, Graduate Nursing Staff, Under Graduate Nurses, Graduate Pharmacists, Under Graduate Pharmacists, Graduate Dietitians, Student Dietitians, Technical Personnel, Supervisors, foremen, persons above the rank of supervisors or foremen, Chief Engineer, office staff and persons regularly employed for not more than 24 hours per week.” (59 employees in the unit).

1139-77-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Crenmar Services Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working at or out of Metropolitan Toronto, save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (43 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1978] OLRB Rep. January).

1205-77-R: United Steelworkers of America (Applicant) v. Royce Enterprises (Respondent).
- and -

1206-77-R: United Steelworkers of America (Applicant) v. Royce Enterprises (Respondent).

Unit: “all employees of the respondent company in Orillia, Ontario, save and except foremen, persons above the rank of foreman, and persons regularly employed for not more than 24 hours per week.” (17 employees in the unit).

1233-77-R: Christian Labour Association of Canada (Applicant) v. Environmental Technical Services Inc. (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

1249-77-R: Association of Commercial and Technical Employees Local 1704, C.L.C. (Applicant) v. (Mississauga) Tenant Action Centre (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Peel.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1269-77-R: Toronto Typographical Union, No. 91 (I.T.U.) (Applicant) v. The Daily Times (Respondent).

Unit: “all employees of the respondent at 33 Queen Street West in Brampton, Ontario employed in the Editorial Department, save and except Managing Editor, City Editor, and persons above the rank of Managing Editor and City Editor, persons regularly employed for not more than twenty-four

(24) hours per week and students employed during the school vacation period.” (11 employees in the unit).

1270-77-R: Canadian Union of Public Employees (Applicant) v. Carleton Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors).

Unit: “all office and clerical employees of the respondent in the Carleton Roman Catholic Separate School Board regularly employed for more than twenty-four hours per week, save and except those employed at 1695 Merivale Road, Co-Ordinator’s office French sector, Pope John XXIII School, known as the French Department, the eastern depot and the western depot.” (53 employees in the unit). (*Having regard to the agreement of the parties*).

1271-77-R: Canadian Union of Public Employees (Applicant) v. Carleton Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the Carleton Roman Catholic Separate School Board regularly employed for not more than twenty-four hours per week, save and except those employed at 1695 Merivale Road, the Co-Ordinator’s office French sector, Pope John XXIII School, known as the French Department, the eastern depot and the western depot.” (76 employees in the unit). (*Having regard to the agreement of the parties*).

1274-77-R: Retail Clerks Union, Local 1977, Chartered by the Retail Clerks International Union (Applicant) v. Zehrs Markets Division of Zehrmart Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the Town of Port Elgin, Ontario, save and except store manager and persons above the rank of store manager.” (63 employees in the unit). (*Having regard to the agreement of the parties*).

1326-77-R: United Rubber, Cork, Linoleum and Plastic Workers of America AFL - CIO - CLC (Applicant) v. Plax Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of Plax Canada Limited in the City of Burlington, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, laboratory technician, manufacturing methods technician, draftsmen, engineering technician, and students employed during the school vacation period.” (176 employees in the unit). (*Having regard to the agreement of the parties*).

1329-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Gladwill Holdings Ltd. (Respondent).

Unit: “all construction labourers employed by the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

1337-77-R: Toronto Joint Board, Amalgamated Clothing and Textile Workers Union (Applicant) v. L. Davis Textiles Co. Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at 187 Geary Avenue and 2700 St. Clair Avenue West, City of

Toronto, save and except foremen, and persons above the rank of foreman, office and sales staff, Manpower trainees, students employed during school vacation periods, and persons regularly employed for not more than 24 hours per week.” (188 employees in the unit). (*Having regard to the agreement of the parties*).

1354-77-R: Ontario Public Service Employees Union (Applicant) v. Ajax and Pickering General Hospital (Respondent).

Unit: “all paramedical personnel employed by the respondent in the Town of Ajax, save and except technical director laboratory, technical director radiology, assistant technical director laboratory, assistant technical director radiology, director of pharmacy, director of physiotherapy, persons above the rank of director, employees working 24 hours a week or less and employees covered by existing collective agreements.” (32 employees in the unit). (*Having regard to the agreement of the parties*).

1364-77-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Borough of Etobicoke (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of The Corporation of the Borough of Etobicoke employed in the Recreation Section of the Parks and Recreation Services Department classified as locker room attendants, health club attendants, cashiers, janitors, lifeguards and life-guard instructors who are regularly employed for not more than 24 hours per week, save and except assistant supervisors, persons above the rank of assistant supervisor and those covered by the subsisting collective agreement between the respondent and Local 185 of the Canadian Union of Public Employees.” (160 employees in the unit). (*Having regard to the agreement of the parties*).

1371-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Costain Estates Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in residential construction in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (12 employees in the unit).

1394-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Stonehill Construction Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

1425-77-R: Office and Professional Employees’ International Union, Local 225 (Applicant) v. C.L.C. Labour Education and Studies Centre (Respondent) v. Canadian Union of Labour Specialties (Intervener).

Unit: “all permanent and part-time employees of the C.L.C. Labour Education and Studies Centre employed in the office in the City of Ottawa (2841 Riverside Drive, Suite 301) save and except all present and future classifications at, or above, the level of Research and Programme Development Assistant.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

1436-77-R: Shantz Bros./Big Bear Employees' Association (Applicant) v. Shantz Bros. Limited and Big Bear Services Ltd. (Respondents).

Unit: "all employees of Shantz Bros. Limited and Big Bear Services Ltd. employed in or out of Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (7 employees in the unit).

1437-77-R: Canadian Union of United Brewery, Flour, Cereal Soft Drink, and Distillery Workers (Applicant) v. Coca-Cola Ltd. (Respondent).

Unit: "all office employees of Coca-Cola Ltd. at Belleville, Ontario, save and except office manager, persons above the rank of office manager, foremen, and sales supervisors." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1441-77-R: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Gosselin Lumber Co. Ltd. (Respondent).

Unit: "all the employees who are engaged in its woods operations on the limits and on the work sites of the Company, in the District of Cochrane, Ontario, including its garage operations at Calstock, Ontario, and its related hauling operations, save and except foremen, persons above the rank of foreman, office staff and scalers." (27 employees in the unit).

1451-77-R: Labourers' International Union of North America - Local 1036 (Applicant) v. Napev Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1480-77-R: United Steelworkers of America (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Hamilton, save and except supervisors, persons above the rank of supervisor, sales staff and persons regularly employed for not more than 24 hours per week." (9 employees in the unit).

1492-77-R: Canadian Food and Allied Workers Local Union 175, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Dunnville Supermarkets Ltd. (Respondent).

Unit: "all employees of the respondent at Dunnville, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

1497-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Allport Investments (Respondent).

Unit: "all construction labourers in the employ of the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1498-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. St. Catharines Ceilings (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1505-77-R: Hotel and Restaurant Employee's and Bartender's International Union, A.F.L., C.I.O., and C.L.C., Local 756 (Applicant) v. Duke's Hotel (1977) Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Port Colborne, save and except the owners." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1507-77-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the Town of Bracebridge (Respondent).

Unit: "all employees of the respondent at the Town of Bracebridge, save and except foremen, persons above the rank of foreman, recreational services employees, office and clerical staff and persons employed for not more than twenty-four (24) hours per week." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1510-77-R: United Steelworkers of America (Applicant) v. DoAll Canada Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and service staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit).

1526-77-R: Labourers' International Union of North America (Applicant) v. Evergreen Property Management (Respondent).

Unit: "all employees of the Respondent engaged in janitorial cleaning and building maintenance at 250 Davenport Road, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1529-77-R: The Canadian Union of Public Employees (Applicant) v. Commercial Caterers Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto (in the True Davidson Nursing Home) save and except head chef, registered dietitian, manager, assistant manager and persons above the rank of assistant manager, students employed during the school vacation period and persons employed for 24 hours per week or less." (29 employees in the unit). (*Having regard to the agreement of the parties*).

1535-77-R: Pharmacists and Professional Employees Association, Local 1976, Chartered by the Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Hillsdale Nursing Home (Respondent).

Unit: "all employees of the Hillsdale Nursing Home at Campbellford working 24 hours per week, or less, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, students employed for the school vacation period and persons covered by a subsisting collective

agreement with the Boot and Shoe Workers Union, affiliated with the Canadian Labour Congress, AFL-CIO." (12 employees in the unit). (*Having regard to the agreement of the parties*).

1538-77-R: Graphic Arts International Union, Local 542 (Applicant) v. Reid Dominion Packaging Limited (Respondent).

Unit: "all employees engaged in the duties of maintenance and janitorial services employed at the Linden Street Plant located in Hamilton, Ontario, save and except foremen and persons above the rank of foreman." (11 employees in the unit). (*Having regard to the agreement of the parties*).

1541-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Canadian Johns-Manville Co. Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America – Local 18 (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1572-77-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Atikokan Building Contractors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1318-77-R: United Steelworkers of America (Applicant) v. Great Lakes Steel Limited (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 (Intervener #1) v. International Union of Operating Engineers, Local 793 (Intervener #2) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers (Intervener #3).

Unit: "all employees of Great Lakes Steel Limited engaged in the fabrication of iron, steel and metal products or other work in connection therewith including maintenance work in and about the company's shops in the City of Thunder Bay, save and except sales, office and clerical employees, watchmen, guards, foremen or persons above the rank of foremen and all employees covered by subsisting agreements." (71 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	61
Number of ballots marked in favour of SHOPMEN'S LOCAL UNION NO. 743 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS	0

1411-77-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Clark Dairy Limited (Respondent) v. The Retail, Wholesale and Department Store Union, AFL-CIO:CLC and its Local 440 (Intervener).

Unit: "all employees of the respondent at its Ottawa plant save and except foremen, persons above the rank of foreman, office staff, operating engineers, firemen and helpers, route salesmen and route inspectors and sales representatives." (36 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervener	9

Applications Certified Subsequent to Post-Hearing Vote

1059-77-R: Canadian Guards Association (Applicant) v. Douglas Aircraft Company of Canada Ltd. (Respondent) v. International Union United Plant Guard Workers of America, Local 1962 (Intervener).

Unit: "all security officers employed by the company in Mississauga, Ontario with the exception of sergeants and persons above the rank of sergeants." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	4

1330-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Trillium Villa Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener).

- and -

1331-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Trillium Villa Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit #1: "all employees of the respondent at Sarnia regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (52 employees in the unit).

Unit #2: "all employees of the respondent at Sarnia, save and except supervisors, persons above the rank of supervisor, registered nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office staff." (53 employees in the unit).

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	86
Number of ballots marked in favour of applicant	80
Number of ballots marked in favour of intervener	6

1344-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. McGowan Fence and Supply Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the

County of Halton and the Townships of Pickering, East and West Whitby in the County of Ontario, engaged in the installation and/or erection of fences, partitions, guard or guiderails, and playground and recreational equipment, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	9	
Number of ballots marked in favour of intervener	2	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1518-77-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited (Respondent) v. Office & Professional Employees International Union, Local 743 (Intervener). (33 employees).

0090-77-R: Retail Clerks, Local 206, Chartered by the Retail Clerks International Association (Applicant) v. Sunnybrook Food Markets (Keele) Limited (Respondent). (3 employees).

0878-77-R: Labourers' International Union of North America, (Applicant) v. F. C. S. Contracting Limited (Respondent). (6 employees).

1164-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. A. Shniffer Ltd. (Respondent) v. Group of Employees (Objectors). (22 employees).

1250-77-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Vision Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener). (40 employees).

1252-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Vision Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener). (40 employees).

1265-77-R: Service Employees International Union, Local 183 (Applicant) v. Extendicare Ltd./Kingston (Respondent). (19 employees).

1447-77-R: Steve Harastovic (Applicant) v. United Steelworkers of America (Respondent) v. Justras Die Casting Limited (Employer). (00 employees).

1464-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. David A. Simons (Respondent). (3 employees).

1466-77-R: United Steelworkers of America (Applicant) v. Toledo Commutator of Canada Limited (Respondent) v. Group of Employees (Objectors). (21 employees).

1530-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. H. G. Susgin (Respondent). (7 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1288-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent).

Voting Constituency: "all mechanical and electrical maintenance employees employed by the respondent at the Toronto Eaton Centre in Metropolitan Toronto, save and except foreman, persons above the rank of foreman, security staff, office and sales staff, cleaning staff and those persons regularly employed for less than 24 hours per week." (15 employees).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	6	

Certification Dismissed Subsequent to Post-Hearing Vote

1345-77-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Harkema Express Lines Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all dependent contractors (owner-operators) working for the respondent at and out of Brampton, Ontario, save and except dispatchers, those above the rank of dispatcher, office and sales staff and employees covered by subsisting collective agreements with the respondent." (89 employees in the unit).

Number of names of persons on list as originally prepared by employer		83
Number of persons who cast ballots	79	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	38	
Number of ballots marked against applicant	39	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1387-77-R: Labourers' International Union of North America, Local 493 (Applicant) v. Janin Building & Civil Works Ltd. General Contractors (Respondent). (9 employees).

1458-77-R: Canadian Union of Public Employees (Applicant) v. Kingston General Hospital Women's Aid Society (Respondent). (17 employees).

1465-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Almonte General Hospital (Respondent) v. Group of Employees (Objectors). (4 employees).

1470-77-R: Graphic Arts International Union, Local 542 (Applicant) v. Paris Graphic Trade Services Limited (Respondent). (15 employees).

1475-77-R: Graphic Arts International Union, Local 542 (Applicant) v. Reid Dominion Packaging Limited (Respondent). (10 employees).

1499-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Beclawat (Ontario) Ltd. (Respondent). (31 employees).

1581-77-R: Local Union 785, of the United Brotherhood of Carpenters and Joiners of America, Formerly Grand River Valley District Council, on behalf of Local Unions, 498, 949, 1940, 2173 (Applicant) v. Comstock International Ltd. (Respondent). (5 employees).

APPLICATION UNDER SECTION 1(4)

1459-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. W. N. Construction (Ottawa) Limited & W. N. Holdings Limited (Respondent). (2 employees). (*Dismissed*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1182-77-U: Robert Young & John Young (Complainants) v. Catalytic Enterprises Limited (Respondent) v. U.A. Local 663 of Plumbers, Pipefitters and Welders (Intervener). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0766-77-R: Isabell Dysart (Applicant) v. Northern Ontario & Quebec District Union of the Retail, Wholesale & Department Store Union AFL:CIO:CLC (Respondent) v. Acklands Limited (Timmins, Ont.) (Intervener). (12 employees). (*Dismissed*).

1095-77-R: Bruce Gray, of the City of Barrie, in the County of Simcoe (Applicant) v. Teamsters' Local Union No. 230 Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Respondent). (*Granted*).

Unit: "all employees of Dennis Moran (Barrie) Limited employed at or working out of Barrie, save and except foremen, persons above the rank of foreman and office staff." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		3
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	3	

1121-77-R: Mary McClellan and Geraldine Cole (Applicant) v. Office and Professional Employees International Union Local 343 (Respondent). (*Granted*).

Unit: "all office employees of Trenton Federal Credit Union Limited, save and except the Manager and the Treasurer." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	7	
Ballots segregated and not counted	1	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	6	

1171-77-R: Gordon Stacey (Applicant) v. The Retail, Wholesale, Hotel and Restaurant Employees Union and its Local #448 (Respondent) v. Queens Hotel (London) Limited (Intervener) v. Group of Employees (Objector). (*Granted*).

Unit: "all full-time and part-time employees of the Hotel employed in the ladies beverage room, men's beverage room and lounge." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of Respondent	3	
Number of ballots marked against Respondent	8	

1306-77-R: Weston D. Leeson, Donald G. Cooper Staff Representatives (Local 663) (Applicant) v. The Ontario Public Service Employees Union (Respondent). (51 employees). (*Granted*).

1357-77-R: Shirley Lorraine Hawkins (Applicant) v. Boot and Shoe Workers' Union (Respondent) v. Hillsdale Nursing Home (Intervener). (35 employees). (*Dismissed*).

1393-77-R: Phillip Gillingwater (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 124, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Respondent) v. Volvo Canada Ltd. (Intervener). (9 employees). (*Granted*).

1467-77-R: Don Shakell (Applicant) v. Local 1739 International Brotherhood of Electrical Workers, Barrie, Ontario (Respondent) v. Shakell Electric and Refrigeration Contractors (Intervener). (3 employees). (*Dismissed*).

1483-77-R: Eric Mackay and Others (Applicant) v. The Hotel and Club Employees Union Local 299 of the Hotel and Restaurant Employees and Bartenders International Union (Respondent) v. Toronto (Harbour Castle) Hilton Hotel, a division of Campeau Corporation (Intervener). (865 employees). (*Dismissed*).

1508-77-R: Auto Salesmen, Pinewood Mercury Sales Ltd. (Applicant) v. International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Respondent). (5 employees). (*Granted*).

1549-77-R: Anthony Genovese (Applicant) v. Thunder Bay Lodge 1120, International Association of Machinists and Aerospace Workers (Respondent). (9 employees). (*Granted*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0490-77-R: The Retail Clerks International Association (Applicant) v. Diamond "Z" Association (Predecessor Trade Union) v. Zehrs Markets Division of Zehrmart Limited (Employer). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1369-77-U: Canadian Pittsburgh Industries, A Division of PPG Industries Canada Ltd. (Resins and Coating Division, Clarkson) (Applicant) v. Oil, Chemical and Atomic Workers International Union, Local Union 9-341-A, J. Da Silva, G. Burt and others as on attached Scheduled "A" (Respondents). (*Withdrawn*).

1583-77-U: Kellogg Salada Canada Ltd. (Applicant) v. S. Baldacchino, L. Bembridge, R. Bentley, J. Blackman, J. Brown, et al (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1005-77-U: The Professional Institute Staff Association (Applicant) v. The Professional Institute of the Public Service of Canada (Respondent). (*Dismissed*).

1319-77-U: Retail Clerks Union, Local 1977 (Chartered by the Retail Clerks International Association) (Applicant) v. Zehrs Markets (Division of Zehrmart Limited) (Respondent). (*Withdrawn*).

1448-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. Costain Estates Limited (Respondent). (*Withdrawn*).

1512-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominiums Corporation No. 77 and James Cousins (Respondent). (*Withdrawn*).

1577-77-U: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Union (Applicant) v. Crosby Food Services Ltd. (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1503-76-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) Local 636 (Complainant) v. Truck Engineering Limited (Respondent). (*Granted*).

0142-77-U: Craig Stephen Kreider (Complainant) v. FAG Bearings Limited (Respondent). (*Granted*).

0423-77-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Nel-Gor Castle Nursing Home (Respondent). (*Dismissed*).

0857-77-U: United Plant Guard Workers of America, Local 1962 (Complainant) v. Olympia & York Developments Limited (Respondent). (*Dismissed*).

0891-77-U: Retail Clerks Union, Local 409 Chartered by the Retail Clerks International Association (Complainant) v. Beaver Lumber Limited (Respondent). (*Withdrawn*).

0983-77-U: Stuart B. Scott (Complainant) v. Canadian Union of Public Employees (Respondent). (*Dismissed*).

1004-77-U: The Professional Institute Staff Association (Complainant) v. The Professional Institute of Public Service Canada (Respondent).

- and -

1074-77-U: The Professional Institute of the Public Service of Canada (Complainant) v. The Professional Institute Staff Association (Respondent). (*Dismissed*).

1028-77-U: Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Aldershot Contractors Equipment Rental Ltd. (Respondent). (*Dismissed*).

1096-77-U: Cleo Metaxakis (Complainant) v. Service Employees Union, Local 204 (Respondent) v. Mount Sinai Hospital (Intervener). (*Dismissed*).

1097-77-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. F. W. Woolworth Co. Ltd. (Respondent). (*Withdrawn*).

1106-77-U: Canadian Food and Associated Services Union (Complainant) v. Windsor Arms Hotel Limited (Respondent). (*Granted*).

1147-77-U: Robert and John Young (Complainants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Respondent) v. Catalytic Enterprises Limited (Intervener). (*Dismissed*).

1239-77-U: Rupert Lee (Complainant) v. Teamsters Local Union 647 Milk & Bread Drivers and Dairy Employees (Respondent) v. Monarch Fine Foods Co. Ltd. (Intervener). (*Dismissed*).

1256-77-U: The Retail Clerks International Association (Complainant) v. Zehrs Markets Division of Zehrmart Limited (Respondent). (*Withdrawn*).

1294-77-U: Edward Dzida (Complainant) v. Electrical Radio & Machine Workers Union (Respondent) v. J.A. Wilson Display Ltd. (Intervener). (*Dismissed*).

1312-77-U: Stephen Burnside (Complainant) v. American Federation of Music (Respondent). (*Withdrawn*).

1358-77-U: Emily Joan Whited (Complainant) v. Local 647 Teamsters, (Respondent) v. Dominion Dairies Limited (Intervener). (*Dismissed*).

1424-77-U: Robin Albert Amor (Complainant) v. Union of Canadian Retail Employees, C.L.C. (Respondent). (*Dismissed*).

1427-77-U: International Ladies' Garment Workers' Union, AFL, CIO, CLC (Complainant) v. Newport Sportswear Ltd. (Respondent). (*Withdrawn*).

1449-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Costain Estates Limited (Respondent). (*Withdrawn*).

1463-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. City Parking Holdings Limited Known as Piccadilly Tube (Respondent). (*Withdrawn*).

1469-77-U: Canadian Brotherhood of Railway Transport and General Workers (Complainant) v. Muller Brothers Limited (Respondent). (*Withdrawn*).

1488-77-U: Sham Ladha (Complainant) v. Consumer Distributing Co. (Respondent) v. Warehousemen and Miscellaneous Drivers Union Local 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener). (*Withdrawn*).

1501-77-U: United Steelworkers of America (Complainant) v. Doall Canada Ltd. (Respondent). (*Withdrawn*).

1524-77-U: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Union (Complainant) v. Crosby Food Services Ltd. (Respondent). (*Withdrawn*).

1531-77-R: Ontario Haulers Union (Complainant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 879, Barlin Construction Limited & National Slag Limited (Respondents). (*Withdrawn*).

1559-77-U: Graphic Arts International Union, Local 542 (Complainant) v. Paris Graphic Trade Services Limited (Respondent). (*Withdrawn*).

1560-77-U: Hotel and Restaurant Employees' and Bartenders' International Union, Local 756 (Complainant) v. Duke's Hotel (Respondent). (*Withdrawn*).

1562-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Horseshoe Tavern (Respondent). (*Withdrawn*).

1566-77-U: Stanley A. Crha (Complainant) v. Unit 13 (hereinafter Union), subdivision of Amalgamated Local No. 27 (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1423-77-M: Work Wear Corporation of Canada Ltd., (Stericloth Division) (Applicant) v. Laundry, Dry Cleaning & Dye House Workers Union, Local 351 (Respondent). (*Granted*).

1506-77-M: Lincoln Place Nursing Home (Applicant) v. Service Employees Union, Local 204 (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

1257-77-R: United Electrical, Radio & Machine Workers of America, (UE), Local 512 (Applicant) v. Winiker Industrial Auctioneers Ltd. (Respondent). (*Granted*).

1378-77-R: Labourers' International Union of North America, Ontario Provincial District Council, on behalf of Local Union 247 (Applicant) v. Dodge Construction Company Limited, and Cardinal Construction Limited (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0531-77-M: The Professional Institute of the Public Service of Canada (Applicant) v. The Professional Institutes Staff Association (Respondent). (*Terminated*).

0706-77-M: Brown's Concrete Products Limited (Applicant) v. Teamsters Local 2300 (Respondent). (*Withdrawn*).

0946-77-M: The General Hospital of Port Arthur (Applicant) v. Service Employees Union, Local 268 (Respondent).

1291-77-M: International Association of Machinists and Aerospace Workers, District Lodge 717 (Applicant) v. Hawker Siddeley Canada Ltd., Forestry Equipment Division (Respondent). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

1111-77-M: A. P. Parts of Canada Limited (Employer) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Trade Union). (*Terminated*).

1431-77-M: Wandlyn Viscount Coffee Shop (Employer) v. Hotel and Restaurant Employees Union, Local 743 (Trade Union).

- and -

1432-77-M: Wandlyn Viscount Coffee Shop (Employer) v. Hotel and Restaurant Employees Union, Local 743 (Trade Union).

APPLICATIONS UNDER SECTION 112A

1030-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Crane Rental Association of Ontario and its affiliate Boon's Crane Service (Respondent). (*Withdrawn*).

1050-77-M: L. Harmel, E. Heitmann and International Union of Elevator Constructors, Local 90 (Applicant) v. Montgomery Elevator Company Limited and National Elevator and Escalator Association (formerly Canadian Elevator Manufacturers Association) (Respondents). (*Dismissed*).

1383-77-R: Hotel, Motel, Restaurant Employees' and Beverage Dispensers' Union Local 757 (Applicant) v. Societa Italiana Di Benevolenza Principe Di Piemonte (Respondent). (*Dismissed*).

1398-77-M: Local Union 2965, The Resilient Floor Workers United Brotherhood of Carpenters and Joiners of America A.F.L.-C.I.O. (Applicant) v. Cannon Carpet Installation Ltd. (Respondent). (*Granted*).

1415-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Crane Rental Association of Ontario and its affiliated Boon's Crane Service Limited (Respondent). (*Withdrawn*).

1416-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Crane Rental Association of Ontario and its affiliate Boon's Crane Service Limited (Respondent). (*Withdrawn*).

1419-77-M: Labourers' International Union of North America, Ontario Provincial District Council, on behalf of Local 247 (Applicant) v. Dodge Construction Company Limited and Cardinal Construction Limited (Respondents). (*Withdrawn*).

1429-77-M: A Council of Trade Unions, acting as the Representative of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Sewer and Watermain Contractors' Association (Respondent). (*Withdrawn*).

1489-77-M: The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700 (Applicant) v. Norak Steel Construction Ltd. The Ontario Erectors Association (Respondents). (*Withdrawn*).

1514-77-M: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. Electrical Construction Association of Hamilton and Andco Anderson Limited (Respondents). (*Withdrawn*).

1521-77-M: Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. Sudbury Electrical Contractors Association (S.E.C.A.) and M.G. Burke Investments Ltd. (Respondents). (*Withdrawn*).

1528-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Armoured Floor Company Limited (Respondent). (*Withdrawn*).

1534-77-M: United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting

Industry of The United States and Canada, Local Union 46 (Applicant) v. Gorwood Contracting Ltd. and The Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1547-77-M: A COUNCIL OF TRADE UNIONS, acting as the Representative and Agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Sewer and Watermain Contractors' Association and Arpani Construction Ltd. (Respondents). (*Withdrawn*).

1578-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Woodpark Construction Services Ltd. (Respondent). (*Withdrawn*).

1622-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Heavy Construction Association of Toronto and Kilmer Van Nostrand Co. Limited (Respondents). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1729-76-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lackie Bros. Limited (Respondent) v. Shopmen's Local Union No. 734 of International Association of Bridge, Structural & Ornamental Iron Workers (Intervener). (*Dismissed*). (*Reconsideration*).

1002-77-R: Louis Rispolie, Ivan Munster, R. H. Olsen and Robert Kelly (Applicants) v. Labourers' International Union of North America Local 183 (Respondent) v. York Condominium Corporation No. 78 (Intervener). (*Dismissed*). (*Termination*). (*Reconsideration*).

1087-77-R: International Union United Plant Guard Workers of America Local 1962 (Applicant) v. Trizec Equities Limited (Respondent). (*Request Denied*).

ONTARIO LABOUR RELATIONS BOARD

Statistical Tables, 3rd Quarter 1977-78 (October 1 – December 31, 1977)

Table 1. Applications and Complaints Filed with the Ontario Labour Relations Board.

Table 2. Hearings of the Ontario Labour Relations Board.

Table 3. Applications and Complaints Disposed of by the Ontario Labour Relations Board, listed by Major Types.

Table 4. Applications Disposed of by the Ontario Labour Relations Board, by Type and Disposition.

Table 5. Representation Votes in Certification Applications Disposed of by the Ontario Labour Relations Board.

Table 6. Representation Votes in Termination Applications Disposed of by the Ontario Labour Relations Board.

Table 7. Time Lapse of Certification Applications Disposed of by the Ontario Labour Relations Board.

Table 8. Time Lapse of Section 79 Complaints Disposed of by the Ontario Labour Relations Board.

Table 9. Time Lapse of Section 112(a) Complaints Disposed of by the Ontario Labour Relations Board.

Table 10. Time Lapse of All Cases Disposed of by the Ontario Labour Relations Board.

TABLE 1

**APPLICATIONS AND COMPLAINTS RECEIVED
BY THE ONTARIO LABOUR RELATIONS BOARD, BY MAJOR TYPES**

TYPE	NUMBER FILED			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. Certification	225	260	724	809
2. Declaration of Termination of Bargaining Rights	22	23	56	60
*3. Declaration of Successor Trade Union or Employer	9	24	34	37
4. Declaration of Common Employer Status	5	NS	9	—
5. Accreditation	2	NS	3	—
6. Declaration of Unlawful Strike	1	18	5	84
7. Declaration of Unlawful Lock-Out	—	3	3	6
**8. Direction Respecting Unlawful Strike or Lock-Out	13	—	55	—
9. Consent to Prosecute	12	14	56	70
10. Complaints Respecting a Contravention of the Act — Section 79	72	105	293	340
***11. Miscellaneous	105	109	273	304
***12. Bill 139 — Employees Health & Safety Act	3	—	5	—
Total	<u>469</u>	<u>556</u>	<u>1516</u>	<u>1710</u>

*Declaration of Successor Trade Union or Employer is a consolidation of Sections 54 & 55 of the OLRA.

**Direction Respecting Unlawful Strike or Lock-Out is a consolidation of Sections 82, 83, 123 and 63 of the Colleges Collective Bargaining Act.

***Miscellaneous is a consolidation of Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) and Section 10.

TABLE 2**HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD**

	NUMBER			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. Hearings and Continuations of Hearings by the Board	388	391	1263	1141

TABLE 3

**APPLICATIONS AND COMPLAINTS DISPOSED
OF BY THE ONTARIO LABOUR RELATIONS BOARD, BY MAJOR TYPES**

TYPE	NUMBER DISPOSED OF			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. Certification	202	275	696	813
2. Declaration of Termination of Bargaining Rights	11	16	52	48
3. Declaration of Successor Trade Union or Employer	7	13	42	22
4. Declaration of Common Employer Status	1	—	3	—
5. Accreditation	—	—	2	—
6. Declaration of Unlawful Strike	1	15	5	49
7. Declaration of Unlawful Lock-Out	—	2	3	6
8. Direction Respecting Unlawful Strike or Lock-Out	9	—	41	—
9. Consent to Prosecute	11	9	38	54
10. Complaints Respecting a Contravention of the Act — Section 79	61	83	243	294
11. Miscellaneous	60	69	174	212
12. Bill 139 — Employees Health & Safety Act	—	—	2	—
Total	<u>363</u>	<u>482</u>	<u>1301</u>	<u>1489</u>

TABLE 4

**APPLICATIONS DISPOSED OF BY THE
ONTARIO LABOUR RELATIONS BOARD BY TYPE AND DISPOSITION.**

DISPOSITION	NUMBER OF EMPLOYEES*			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. CERTIFICATION				
Granted	4181	4254	15775	14871
Dismissed	2284	2285	5287	5645
Withdrawn	209	1047	2293	2560
Total	<u>6674</u>	<u>7586</u>	<u>23355</u>	<u>23076</u>
2. TERMINATION OF BARGAINING RIGHTS				
Granted	199	88	1068	397
Dismissed	146	246	207	893
Withdrawn	—	187	79	287
Total	<u>345</u>	<u>521</u>	<u>1354</u>	<u>1577</u>
Total	<u>7019</u>	<u>8107</u>	<u>24709</u>	<u>24653</u>
NUMBER OF APPLICATIONS				
TYPE	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. CERTIFICATION				
Granted	144	172	488	546
Dismissed	42	57	130	146
Withdrawn	26	46	88	121
Total	<u>212</u>	<u>275</u>	<u>706</u>	<u>813</u>
2. TERMINATION OF BARGAINING RIGHTS				
Granted	6	3	30	17
Dismissed	7	10	16	24
Withdrawn	—	3	8	7
Total	<u>13</u>	<u>16</u>	<u>54</u>	<u>48</u>
3. SUCCESSOR TRADE UNION OR EMPLOYER				
Granted	3	—	29	—
Dismissed	1	—	3	—
Withdrawn	2	—	6	—
Total	<u>6</u>	<u>—</u>	<u>38</u>	<u>—</u>

TYPE	NUMBER OF APPLICATIONS			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
4. COMMON EMPLOYER STATUS				
Granted	-	-	-	-
Dismissed	-	1	1	4
Withdrawn	1	-	2	1
Total	<u>1</u>	<u>1</u>	<u>3</u>	<u>5</u>
5. ACCREDITATION				
Granted	-	-	1	-
Dismissed	-	1	-	1
Withdrawn	-	-	-	-
Total	<u>-</u>	<u>1</u>	<u>1</u>	<u>1</u>
6. UNLAWFUL STRIKE				
Granted	-	-	1	1
Dismissed	2	-	2	-
Withdrawn	4	2	7	2
Total	<u>6</u>	<u>2</u>	<u>10</u>	<u>3</u>
7. UNLAWFUL LOCK-OUT				
Granted	-	-	-	1
Dismissed	-	1	-	1
Withdrawn	-	1	2	2
Total	<u>-</u>	<u>2</u>	<u>2</u>	<u>4</u>
8. DIRECTION RESPECTING UNLAWFUL STRIKE OR LOCK-OUT				
Granted	1	5	6	18
Dismissed	2	1	9	8
Withdrawn	4	6	24	22
Total	<u>7</u>	<u>12</u>	<u>39</u>	<u>48</u>
9. CONSENT TO PROSECUTE				
Granted	-	1	2	3
Dismissed	-	1	7	8
Withdrawn	11	7	29	43
Total	<u>11</u>	<u>9</u>	<u>38</u>	<u>54</u>
10. COMPLAINTS UNDER SECTION 79				
Granted	10	12	33	33
Dismissed	17	17	52	58
Withdrawn	39	54	163	203
Total	<u>66</u>	<u>83</u>	<u>248</u>	<u>294</u>

TYPE	NUMBER OF APPLICATIONS			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
11. MISCELLANEOUS				
Granted	11	13	37	44
Dismissed	12	9	25	24
Withdrawn	41	46	116	138
Total	<u>64</u>	<u>68</u>	<u>178</u>	<u>206</u>
12. BILL 139				
Granted	—	—	—	—
Dismissed	1	—	1	—
Withdrawn	—	—	2	—
Total	<u>1</u>	<u>—</u>	<u>3</u>	<u>—</u>
Total	<u>387</u>	<u>469</u>	<u>1320</u>	<u>1476</u>

*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time that the applications for certification and termination were filed with the Board.

TABLE 5**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD.**

TYPE	NUMBER OF VOTES			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. CERTIFICATION AFTER VOTE*				
Pre-Hearing Vote	9	17	36	43
Post-Hearing Vote	5	8	18	23
Ballots not Counted	—	—	—	—
2. DISMISSED AFTER VOTE				
Pre-Hearing Vote	5	15	16	32
Post-Hearing Vote	13	11	28	28
Ballots not Counted	1	—	3	2
Total	<u>33</u>	<u>51</u>	<u>101</u>	<u>128</u>

*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE 6**REPRESENTATION VOTES IN TERMINATION APPLICATIONS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD.**

TYPE	NUMBER OF VOTES			
	3rd Quarter 1977-78	3rd Quarter 1976-77	1st 9 Months 1977-78	Fiscal Year 1976-77
1. Respondent Union Successful*	1	3	1	4
2. Respondent Union Unsuccessful	5	3	25	15
Total	<u>6</u>	<u>6</u>	<u>26</u>	<u>19</u>

*In Termination Proceedings, where a vote is taken, the applicant is a group of employees of the employer; the incumbent union is thus the respondent.

TABLE 7

**TIME LAPSE OF CERTIFICATION APPLICATIONS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD, 3RD
QUARTER 1977**

Time Taken in Calendar Days	NUMBER			PER CENT			CUMULATIVE PER CENT		
	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977
TOTAL	<u>202</u>	<u>234</u>	<u>260</u>	<u>100.0</u>	<u>100.0</u>	<u>100.0</u>	<u>—</u>	<u>—</u>	<u>—</u>
Under 8 days	1	3	7	0.5	1.2	2.7	0.5	1.2	2.7
8 — 14	25	36	46	12.4	15.4	17.7	12.9	16.6	20.4
15 — 21	52	65	68	25.8	27.8	26.2	38.7	44.4	46.6
22 — 28	22	31	42	11.0	13.3	16.2	49.7	57.7	62.8
29 — 35	15	12	10	7.4	5.1	3.8	57.1	62.8	66.6
36 — 42	10	13	18	5.0	5.6	6.9	62.1	68.4	73.5
43 — 49	8	9	17	4.0	3.9	6.5	66.1	72.3	80.0
50 — 56	13	7	9	6.5	3.0	3.5	72.6	75.3	83.5
57 — 63	10	5	3	5.0	2.2	1.2	77.6	77.5	84.7
64 — 70	10	2	4	5.0	0.9	1.5	82.6	78.4	86.2
71 — 77	3	2	4	1.5	0.9	1.5	84.1	79.3	87.7
78 — 84	4	4	4	1.9	1.6	1.5	86.0	80.9	89.2
85 — 91	2	4	4	0.9	1.6	1.5	86.9	82.5	90.7
92 — 98	1	3	2	0.5	1.2	0.8	87.4	83.7	91.5
99 — 105	2	3	4	0.9	1.2	1.5	88.3	84.9	93.0
106 — 126	8	6	3	4.0	2.6	1.2	92.3	87.5	94.2
127 — 147	8	7	1	4.0	3.0	0.4	96.3	90.5	94.6
148 — 168	2	2	1	0.9	0.9	0.4	97.1	91.4	95.0
169 and over	6	20	13	2.9	8.6	5.0	100.0	100.0	100.0

TABLE 8

**TIME LAPSE OF SECTION 79 COMPLAINTS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD, 3RD
QUARTER 1977**

Time Taken in Calendar Days	NUMBER			PER CENT			CUMULATIVE PER CENT		
	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977
TOTAL	<u>61</u>	<u>95</u>	<u>87</u>	<u>100.0</u>	<u>100.0</u>	<u>100.0</u>	<u>—</u>	<u>—</u>	<u>—</u>
Under									
8 days	1	7	2	1.6	7.3	2.3	1.6	7.3	2.3
8 – 14	6	7	7	9.8	7.3	8.0	11.4	14.6	10.3
15 – 21	12	23	22	19.6	24.2	25.3	31.0	38.8	35.6
22 – 28	8	13	18	13.1	13.7	20.7	44.1	52.5	56.3
29 – 35	—	5	4	—	5.3	4.6	44.1	57.8	60.9
36 – 42	2	4	1	3.3	4.2	1.1	47.4	62.0	62.0
43 – 49	2	4	3	3.3	4.2	3.5	50.7	66.2	65.5
50 – 56	—	5	3	—	5.3	3.5	50.7	71.5	69.0
57 – 63	—	2	6	—	2.1	6.9	50.7	73.6	75.9
64 – 70	4	3	2	6.6	3.1	2.3	57.3	76.7	78.2
71 – 77	1	2	3	1.6	2.1	3.5	58.9	78.8	81.7
78 – 84	3	3	2	4.9	3.1	2.3	63.8	81.9	84.0
85 – 91	2	1	0	3.3	1.1	0.0	67.1	83.0	—
92 – 98	1	4	2	1.6	4.2	2.3	68.7	87.2	86.3
99 – 105	2	1	0	3.3	1.1	0.0	72.0	88.3	—
106 – 126	4	1	1	6.6	1.1	1.1	78.6	89.4	87.4
127 – 147	5	1	0	8.2	1.1	0.0	86.8	90.5	—
148 – 168	4	1	5	6.6	1.1	5.7	93.4	91.6	93.1
169 and over	4	8	6	6.6	8.4	6.9	100.0	100.0	100.0

TABLE 9

**TIME LAPSE OF SECTION 112(a) COMPLAINTS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD. 3RD
QUARTER 1977**

Time Taken in Calendar Days	NUMBER			PER CENT			CUMULATIVE PER CENT		
	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977
TOTAL	<u>45</u>	<u>55</u>	<u>40</u>	<u>100.0</u>	<u>100.0</u>	<u>100.0</u>	<u>—</u>	<u>—</u>	<u>—</u>
Under 8 days	—	2	0	0	3.6	0.0	0	3.6	0.0
8 — 14	18	18	15	40.0	32.8	37.5	40.0	36.4	37.5
15 — 21	9	16	2	20.0	29.2	5.0	60.0	65.6	42.5
22 — 28	9	2	3	20.0	3.6	7.5	80.0	69.2	50.0
29 — 35	1	1	6	2.2	1.8	15.0	82.2	71.0	65.0
36 — 42	—	0	1	—	—	2.5	—	—	67.5
43 — 49	1	1	2	2.2	1.8	5.0	84.4	72.8	72.5
50 — 56	2	2	2	4.6	3.6	5.0	89.0	76.4	77.5
57 — 63	—	3	1	—	5.5	2.5	—	81.9	80.0
64 — 70	—	2	1	—	3.6	2.5	—	85.5	82.5
71 — 77	1	0	1	2.2	—	2.5	91.2	—	85.0
78 — 84	—	0	2	—	—	5.0	—	—	90.0
85 — 91	—	1	0	—	1.8	0.0	—	87.3	—
92 — 98	1	4	0	2.2	7.3	0.0	93.4	94.6	—
99 — 105	—	0	1	—	—	2.5	—	—	92.5
106 — 126	1	2	1	2.2	3.6	2.5	95.6	98.2	95.0
127 — 147	1	0	0	2.2	—	0.0	97.8	—	—
148 — 168	—	0	1	—	—	2.5	—	—	97.5
169 and over	1	1	1	2.2	1.8	2.5	100.0	100.0	100.0

TABLE 10

**TIME LAPSE OF ALL CASES
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD, 3RD
QUARTER 1977**

Time Taken in Calendar Days	NUMBER			PER CENT			CUMULATIVE PER CENT		
	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977	3rd Qtr. 1977	2nd Qtr. 1977	1st Qtr. 1977
TOTAL	<u>363</u>	<u>448</u>	<u>484</u>	<u>100.0</u>	<u>100.0</u>	<u>100.0</u>	<u>—</u>	<u>—</u>	<u>—</u>
Under									
8 days	6	19	19	1.7	4.2	3.9	1.7	4.2	3.9
8 – 14	55	64	77	15.2	14.4	15.9	16.9	18.6	19.8
15 – 21	81	118	112	22.3	26.4	23.1	39.2	45.0	42.9
22 – 28	57	53	80	15.7	11.8	16.5	54.9	56.8	59.4
29 – 35	15	22	29	4.1	4.9	6.0	59.0	61.7	65.4
36 – 42	14	18	23	3.7	4.0	4.8	62.7	65.7	70.2
43 – 49	13	17	27	3.6	3.8	5.6	66.3	69.5	75.8
50 – 56	14	15	16	3.9	3.4	3.3	70.2	72.9	79.1
57 – 63	11	14	11	3.0	3.1	2.3	73.2	76.0	81.4
64 – 70	15	9	9	4.1	2.0	1.9	77.3	78.0	83.3
71 – 77	4	5	13	1.1	1.1	2.7	78.4	79.1	86.0
78 – 84	8	6	12	2.2	1.3	2.5	80.6	80.4	88.5
85 – 91	5	8	8	1.4	1.8	1.7	82.0	82.2	90.2
92 – 98	4	11	4	1.1	2.5	0.8	83.1	84.7	91.0
99 – 105	5	5	5	1.4	1.1	1.0	84.5	85.8	92.0
106 – 126	17	13	5	4.8	2.9	1.0	89.3	88.7	93.0
127 – 147	14	10	2	3.7	2.2	0.4	93.0	90.9	93.4
148 – 168	7	6	7	2.0	1.3	1.4	95.0	92.2	94.8
169 and over	18	35	25	5.0	7.8	5.2	100.0	100.0	100.0



Labour
Relations Board

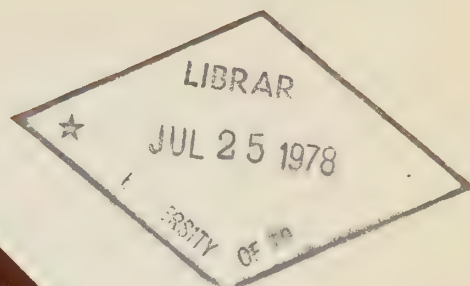
Ontario

Decisions

March 78

Government
Publications

4261V
R
54



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
W. GIBSON
A. GRIBBEN
L. HEMSWORTH
A. HERSHKOVITZ
O. HODGES
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
H. SIMON
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYSLEY

Solicitor R.O. MACDOWELL

Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

CASES REPORTED

Bigelow-Liptak of Canada Ltd., Sarnia Construction Association, Re Labourers' International Union of North America, Local 1089	312
Canteen of Canada Ltd., Re Kenneth Bates, et al And Retail, Wholesale and Department Store Union and its Local 414 And Michael Danyluk	207
Consolidated Sand and Gravel, Re D. Brown, et al	264
Culverhouse Foods Incorporated, Re Local 550, Canadian Food and Allied Workers Chartered by the Amalgamated Meat Cutters and Butcher Workmen	219
Custom Aggregates, Re Frank Newbold And Stanley Ofrecht, And United Cement, Lime and Gypsum Workers International Union, AFL-CIO-CLC	215
Dufferin Aggregates, A Division of Dufferin Materials & Construction Ltd., Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers	278
Eaman Riggs Limited, Re Sheet Metal Workers' Local 537 And International Association of Heat and Frost Insulators and Asbestos Workers, Local 95	228
Halton Board of Education, The, Re The Association of Professional Student Services Personnel	299
Journal Publishing Company of Ottawa, Limited, The, Re Raymond Albert Lambert And Ottawa Newspaper Guild, Local 205	291
Journal Publishing Co. Of Ottawa, Limited, The, Re Raymond Albert Lambert And Ottawa Newspaper Guild, Local 205	295
Local 865, International Union of Operating Engineers, Re George Johnston and Others .	326
Lorain Products (Canada) Ltd., Re International Union of Electrical Radio and Machine Workers – AFL-CIO-CLC And Group of Employees	262
Ontario Precast Concrete Manufacturers' Association, Erectors Division, Re The General Contractors' Section of the Toronto Construction Association And Labourers' International Local 506 And Labourers' International, Ontario Provincial District Council	284
Ontario Hydro, Re Ontario Allied Construction Trades Council And The Electrical Power Systems Construction Association	304
Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada, Re Anthony Frank Amis, a member of Local 598 of the Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada, And General President Joseph T. Power And Local 598 Trustee William E. McMynn AND The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Re Frank Amis and Zygmunt Jedrasik	223

II

Operative Plasterers, Re Anthony Frank Amis, a member of Local 598 And The Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada, And General President Power and Local 598 Trustee McMynn, AND The Operative Plasterers' and Cement Masons' International Re Frank Amis and Zygmunt Jedrasik	227
Premium Forest Products Ltd., Re United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC	317
Rayco Stamping Products Limited, Re Christian Labour Association of Canada	310
Sudbury & District Society for Prevention of Cruelty of Animals, Re Marilyn Ducharme And Teamsters Union Local 938	321
Trent Metals Ltd., Re United Steelworkers of America And Group of Employees	302
V.S. Services Ltd., Re Service Employees International Union, Local 183, AFL-CIO-CLC	308
V.S. Services Q.E. Hospital, Re Mr. Denys Griffith And The Workers Union of Queen Elizabeth Hospital (C.N.T.U.)	323

INDEX OF CASES

Accreditation – Reconsideration – Whether Board will reconsider order two years after its issue – Effect of applicant's failure to appear at earlier hearing	
THE GENERAL CONTRACTORS' SECTION OF THE TORONTO CONSTRUCTION ASSOCIATION v. LABOURERS' INTERNATIONAL LOCAL 506 v. ERECTORS DIVISION, ONTARIO PRECAST CONCRETE MANUFACTURERS' ASSOCIATION v. LABOURERS' INTERNATIONAL UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL	284
Arbitration – Dispute concerning shift scheduling – meaning of term “five consecutive working days”	
LABOURERS' INTERNATIONAL UNION, LOCAL 1089 v. BIGELOW-LIPTAK OF CANADA LTD. SARNIA CONSTRUCTION ASSOCIATION	312
Arbitration – Practice – Procedure – Collective agreement between association of construction employers and council of trade unions – Allegation of breach of collective agreement by one employer – Status of that employer in section 112a arbitration proceedings	
ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL v. THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION and ONTARIO HYDRO	304
Certification – Bargaining unit – Whether part time employees in two classifications have a different community of interest	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 183, AFL-CIO-CLC v. V.S. SERVICES LTD.	308
Certification – Membership Evidence – Effect of irregularities in solicitation of membership evidence	
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO-CLC v. PREMIUM FOREST PRODUCTS LTD.	317
Employee – Whether owner-drivers of gravel trucks are dependent contractors	
CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS v. DUFFERIN AGGREGATES, A DIVISION OF DUFFERIN MATERIALS & CONSTRUCTION LTD.	278
Employee – Whether owner operators of trucks are dependent contractors	
D. BROWN, et al v. CONSOLIDATED SAND AND GRAVEL	264
Employee – Whether psychologists employed by school board are managerial	
THE ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL v. THE HALTON BOARD OF EDUCATION	299

Jurisdictional Dispute – Evidence – Whether request by trade union to assign work to its members – Effect of availability of arbitration to resolve aspects of the dispute – Effect of reference to Impartial Jurisdictional Dispute Board in Washington – Whether Board is without jurisdiction to entertain complaint – Government official giving evidence but pleading executive privilege on cross-examination – Whether evidence in chief must be disregarded – Effect of Apprenticeship and Tradesman's Qualification Act and decision certifying work in question as sheet metal workers' work	
EAMAN RIGGS LIMITED v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 537, and INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 95	228
Lockout – Effect of termination of lockout prior to application for direction – Whether Board will issue direction	
CHRISTIAN LABOUR ASSOCIATION OF CANADA v. RAYCO STAMPING PRODUCTS LIMITED	310
Practice – Procedure – Whether applicant seeking certification pursuant to section 7a must give particulars of misconduct to be alleged	
UNITED STEELWORKERS OF AMERICA v. TRENT METALS LTD. v. GROUP OF EMPLOYEES	302
Reconsideration – Effect of employer refusal to reinstate illegally discharged employees for more than a year following Board's order – Effect of pending judicial review – Whether Board will vary compensation order so as to redress additional financial loss resulting from non-compliance	
LOCAL 550, CANADIAN FOOD AND ALLIED WORKERS CHARTERED BY THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN v. CULVERHOUSE FOODS INCORPORATED	219
Reconsideration – Termination – Evidence – Whether Board should consider evidence of bitter labour dispute – Whether relevant to origination of termination application	
RAYMOND ALBERT LAMBERT v. OTTAWA NEWSPAPER GUILD, LOCAL 205 v. THE JOURNAL PUBLISHING COMPANY OF OTTAWA, LIMITED ...	295
Reconsideration – Whether Board will reconsider earlier certification pursuant to section 7a – Effect of representation vote taken following employer's intimidatory conduct	
INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS – AFL-CIO-CLC v. LORAIN PRODUCTS (CANADA) LTD. v. GROUP OF EMPLOYEES	262
Strike – Legal strike ongoing at one location – Respondents engaged in picketing at secondary location – Whether Board can restrain picketing	
CANTEEN OF CANADA LTD. v. KENNETH BATES, JOHN SCHRAA, and MALCOLM MacINTYRE and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION AND ITS LOCAL 414 and MICHAEL DANYLUK	207

Termination – Collective Agreement – Timeliness – Practice – Procedure – Effect of employees naming international union when local has bargaining rights – Whether application timely having regard to effect on collective agreement of Hospital Labour Disputes Arbitration Act GEORGE JOHNSTON AND OTHERS v. LOCAL 865, INTERNATIONAL UNION OF OPERATING ENGINEERS	326
Termination – Evidence – Application made following a long and bitter labour dispute – Whether Board will permit respondent to lead evidence and conduct extensive cross-examination concerning the dispute in order to establish the climate in which the termination application originated – Whether evidence relevant RAYMOND ALBERT LAMBERT v. OTTAWA NEWSPAPER GUILD, LOCAL 205 v. THE JOURNAL PUBLISHING COMPANY OF OTTAWA, LIMITED ...	291
Termination – Petition signed by employees rejecting bargaining agent – Effect of employees signing petition reaffirming their support MR. DENYS GRIFFITH v. THE WORKERS UNION OF QUEEN ELIZABETH HOSPITAL (C.N.T.U.) v. V.S. SERVICES Q.E. HOSPITAL	323
Termination – Representation vote – Effect of employer employing, retaining and recalling strike replacements for the purpose of influencing a representation vote taken during a strike FRANK NEWBOLD AND STANLEY OFRECHT v. UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION, AFL-CIO-CLC v. CUSTOM AGGREGATES	215
Termination – Whether petition in support of application voluntary MARILYN DUCHARME v. TEAMSTERS UNION LOCAL 938 v. SUDBURY & DISTRICT SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS ...	321
Trusteeship – Whether Board should extend trusteeship beyond twelve months – Whether Board may grant permission to extend trusteeship after twelve month period has already expired ANTHONY FRANK AMIS, A MEMBER OF LOCAL 598 OF THE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE U.S.A. AND CANADA v. OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE U.S.A. AND CANADA; GENERAL PRESIDENT JOSEPH T. POWER; AND LOCAL 598 TRUSTEE WILLIAM E. McMYNN, and THE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA v. FRANK AMIS AND ZYGMUNT JEDRASIK	223
Trusteeship – Whether Board should extend trusteeship beyond twelve months – Whether Board may grant permission to extend trusteeship after twelve month period has already expired	

ANTHONY FRANK AMIS, A MEMBER OF LOCAL 598 OF THE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE U.S.A. AND CANADA v. OPERATIVE PLASTERERS' OF THE U.S.A. AND CANADA; GENERAL PRESIDENT JOSEPH T. POWER; and TRUSTEE McMYNN; and THE OPERATIVE PLASTERERS' INTERNATIONAL OF THE UNITED STATES AND CANADA v. FRANK AMIS AND ZYGMUNT JEDRASIK 227

1715-77-U Canteen of Canada Ltd., (Applicant), v. Kenneth Bates, John Schraa, and Malcolm MacIntyre and Retail, Wholesale and Department Store Union and its Local 414 and Michael Danyluk, (Respondents).

Strike – Legal strike ongoing at one location – Respondents engaged in picketing at secondary location – Whether Board can restrain picketing

BEFORE: Donald D. Carter, Chairman.

APPEARANCES: *James Hassell and L.G. Willmott for the applicant; Aubrey E. Golden, Elizabeth J. Lennon and Michael Danyluk for the respondents.*

DECISION OF THE BOARD; March 28, 1978.

1. This is an application under section 82 of the *Labour Relations Act* seeking a direction restraining picketing by the respondents at the applicant's premises at Cambridge and Windsor, and a direction requiring the respondent union to instruct its members employed by the applicant at the Windsor location to return to work forthwith.

2. At the hearing it was agreed that the Board would deal initially with the applicant's request to restrain the picketing at its Cambridge and Windsor locations. This request raised the question of the extent of this Board's authority to restrain picketing activity – a question that has important implications for the conduct of labour relations in Ontario. Given the importance of this question, the parties agreed that the hearing should be divided so that evidence and argument relating only to this initial question would be heard, but without any prejudice to the later introduction of further evidence and arguments relating to other aspects of this application.

3. The applicant is in the food services business and operates out of several locations in Ontario. The respondent union is the bargaining agent for two bargaining units of employees at the applicant's Toronto location, and three bargaining units of employees at its Windsor location. Another union, the Retail Clerks Union, Local 206, represents two bargaining units of employees at the applicant's Cambridge location.

4. The bargaining unit employees operating out of the Toronto location were engaging in a legal strike at all material times. Picketing in support of the strike, however, was not confined to the applicant's Toronto location but began to occur at the Cambridge and Windsor locations. A result of this picketing activity was certain refusals of bargaining unit employees at these latter two locations to cross the picket line, even though these employees were not in a position to engage in a legal strike. By the time of the hearing of this application the picketing at Cambridge and Windsor had been discontinued and the employees at these two locations were reporting to work.

5. The picket line incidents at Windsor and Cambridge require further elaboration. The picketing began at Cambridge on the morning of February 7, 1978. Some time prior to 6.00 a.m. four pickets appeared at the Cambridge premises – two at each of the two entrances to the applicant's premises. The members of the Retail Clerks Union employed by the applicant initially refused to cross the picket line, but after the intervention of an official of that union all bargaining unit employees, although somewhat reluctantly, crossed the

picket line. Customer deliveries for that day were delayed as the result of this incident, but all customers were eventually serviced. On February 9, 1978, four pickets appeared once again at the Cambridge premises in the early morning but this time the Cambridge bargaining unit employees crossed the picket line immediately.

6. On the following day, February 10th, nine pickets appeared outside the applicant's Cambridge premises, just prior to the commencement of the work day. The respondents Bates, Schraa and MacIntyre were identified as being among this group of pickets. Approximately twenty-six of the Cambridge bargaining unit employees refused to cross the picket line despite being advised by an official of the Retail Clerks Union of their obligation to cross the picket line. These employees had parked their delivery vehicles in the parking lot across from the applicant's premises and refused to cross the picket line to pick up supplies for the daily delivery. Eventually, supplies were brought to them in a larger truck so that the loading could take place outside the picket line. Deliveries to the applicant's customers were considerably delayed because of this incident.

7. As further background to this last incident, it should be mentioned that two meetings had occurred on the day before. The first meeting between the district manager of the Cambridge operation, William Ryan, and the Cambridge employees represented by the Retail Clerks Union was held on the applicant's premises in the late afternoon. The meeting was called by Ryan to discuss the applicant's position in the Toronto strike and lasted for approximately one hour. Following this meeting the Cambridge bargaining unit employees and the four pickets from Toronto met at Carl's Tavern for about an hour. The evidence indicates that the Toronto employees explained their position in the labour dispute. There was no evidence that the crossing of the picket line was discussed at that meeting.

8. One further matter relating to the Cambridge situation should be set out. After the Toronto strike had commenced, one supervisor from Toronto had been transferred to Cambridge to supervise the packaging of food by the Cambridge employees for certain customers in the Cambridge area. These customers, prior to the strike, had been supplied with food prepared at the Toronto commissary.

9. The picketing at Windsor began on the evening of February 12, 1978, when nine pickets, including the respondents Danyluk, Bates, Schraa and MacIntyre, appeared outside the applicant's premises. Two servicemen and a maintenance man refused to cross the picket line that evening. The pickets reappeared the next morning and approximately thirty-six bargaining unit employees arrived for work at that time but refused to cross the line. The picketing continued on the following day, February 14th, and again no bargaining unit employees crossed the picket line.

10. The pickets at Windsor handed out two leaflets—one a reply to the position taken by the employer in the Toronto strike and the other an appeal to union members to boycott "all machines owned by Canteen of Canada, food served by Walfood Company, and *scab* machines in normal Canteen of Canada locations". The evidence indicated that union officials working at the Windsor locations made no efforts to persuade the Windsor bargaining unit employees to cross the picket line, nor did they cross the picket line themselves. However, there was also evidence that the applicant's practice was not to require its bargaining unit employees at Windsor to cross picket lines when making deliveries but, in such cases, to have the deliveries made by supervisors. Sinclair Hillman, the union's plant chair-

man at Windsor, testified that he had met briefly with Danyluk, Bates, Schraa and MacIntyre on February 12, 1978, but that the purpose of the meeting was merely social.

11. On the weekend of February 4th, just prior to the appearance of the picket lines at Cambridge and Windsor, a hockey tournament was held with teams of employees from London, Cambridge, Windsor and Toronto participating. Perhaps because of the strike situation, only one supervisor participated in the tournament, the remainder of the employees coming from the bargaining units at these locations. There was no evidence presented to the Board that the tournament was other than a recreational activity, and the Board cannot draw any inference of a conspiracy among these employees to spread the strike against the applicant.

12. The facts as they emerged at the hearing reveal a situation where peaceful picketing at Cambridge and Windsor has caused some disruption of the applicant's operations at these two locations, especially at Windsor. Whether the refusals to cross the picket line amounted to strike action is a matter that remains to be decided if the hearing on this matter should continue. Moreover, there is no evidence in this case of any acts other than the picketing itself being employed to encourage these refusals. It is quite clear that, if the pickets had not appeared at the two locations, there would have been no refusals to either report to work or to continue working.

13. The question is whether the Board's specific remedial jurisdiction over illegal strikes and lock-outs encompasses this kind of picketing situation. The primary prohibition against untimely economic action is found in section 63 of the *Labour Relations Act*:

63. – (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

15. This primary prohibition is reinforced by the prohibitions found in sections 65, 66, 67 of the Act:

65. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

66. No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organization shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

67. – (1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection 1 does not apply to any act done in connection with a lawful strike or lawful lock-out.

16. Specific remedial powers to deal with contraventions of these prohibitions are found in sections 82, 83, and 83a for all matters arising outside the construction industry, and in section 123 for matters falling within the construction industry:

82. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized an unlawful strike or that an officer, official or agent of a trade union or council of trade unions, counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

83. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

83a. The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under section 82 or 83, exclusive of the reasons therefor, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

123. – (1) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

(2) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under this section exclusive of the reasons therefor, in the prescribed form, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

17. While none of these sections expressly refer to the act of picketing, it is apparent that the provisions of sections 65 and 67 are sufficiently wide to prohibit at least some incidents of picketing. An examination of the Board's previous decisions reveals that the exact scope of these prohibitions has never been clearly established. Some conclusions, however, can be drawn from the Board's jurisprudence in this area.

18. First, where picketing not connected with a lawful strike causes other employees to engage in an unlawful strike, such picketing can be the subject of a direction from the Board. The Board's previous decisions dealing with this type of situation all involved the participation in the picketing of either a union, council of trade unions, or union officials, and appear to rest upon the substantive prohibition found in section 65 of the Act, making it unlawful for a trade union, council of trade unions, and union officials to "counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike". The actual directions restraining the picketing, however, would flow from either the specific remedial provision in section 82 of the Act or, in the case of construction industry disputes, section 123 of the Act.

19. One of the earlier cases where the Board issued a direction restraining picketing was *D.R. Crawford Construction Ltd.*, [1973] OLRB Rep. May 259. There, a picket line was set up at a construction site for the purpose of informing other employees working on the site that a certain employer was a non-union contractor. The Board directed the respondents in that case, a council of trade unions and certain trade union officials, to discontinue the picket line "unless and until such time as the employees may be legally entitled to strike".

20. Picketing was again restrained by the Board in *Wheelabrator Corporation of Canada*, [1974] OLRB Rep. July 490. In that case, the Board found that the picketing did not arise out of lawful collective bargaining (appearing to be for the purpose of gaining recognition), and that the picketing had brought about an unlawful strike by other employees. In these circumstances, the Board directed the respondent, a union business agent, and other persons acting on his behalf, to refrain from picketing, watching or besetting or attempting to picket certain premises.

21. There are two factors of some significance that emerge from these decisions. First, the picketing in question was not in support of a lawful strike and, second, that picketing caused other employees to engage in a lawful strike. The significance of each of these factors can be appreciated by asking the following questions. What legal result would follow if the picketing, although causing other employees to engage in an unlawful strike were done in connection with a legal strike? Second, what would be the legal result, if the picketing (although not done in connection with a lawful strike), did not cause other employees to engage in an unlawful strike?

22. The removal of the second factor – the illegal strike resulting from the picketing activity – can be found in *North Simcoe Electrical Contracting Ltd.*, [1973] OLRB Rep. June 336. In that case a construction site was picketed by members of one union apparently because members of another competing union were performing certain work. The evidence, however, did not establish that the picketing had caused other employees to engage in an unlawful strike, and the Board refused to issue a direction. The picketing standing alone, even though it did not appear to be in support of a lawful strike, was not considered by the Board to create a sufficient legal basis for the issuance of a direction under section 123 of the Act.

23. Does the same result flow from the situation where the converse holds so that picketing, but in support of a lawful strike, causes other employees to engage in an unlawful strike? The Board's order in *D.R. Crawford Construction Ltd.*, *supra*, would suggest that the picketing must be connected with something other than a lawful strike before it will be restrained. By the terms of that order, the picketing was restrained "unless and until such time as the employees may be legally entitled to strike". The legal basis for this qualified order, however, was not expressly set out in that decision. On the basis of this case, therefore, one can reach only a tentative conclusion that picketing carried out in connection with a lawful strike cannot be the subject of a restraining order under section 82 or 123 of the Act.

24. This tentative conclusion is supported by those provisions of the Act intended to confine labour disputes. Admittedly, it is possible to argue, as did counsel for the applicant, that the wording of section 65 might be broad enough to prohibit any picketing that causes others to engage in an unlawful strike, whether such picketing is in support of a lawful strike

or not. This one provision, however, should not be read in isolation from the other provisions of the Act. The overall statutory scheme to confine labour disputes, in the Board's view, suggests that section 65 must be interpreted more narrowly.

25. More specifically, the prohibition in section 65 must be read together with the qualified prohibition set out in section 67. Section 67, in one respect, is the more sweeping prohibition of the two, enjoining any person from acting in such a way as would cause other persons to engage in an unlawful strike. This prohibition is not restricted to trade unions, councils of trade unions, or union officials, but applies to any person. Moreover, it refers to any act that would likely cause others to engage in an unlawful strike, and not just to conduct amounting to counselling, supporting, or encouraging of the strike. In other words, under section 67, it is not necessary to establish that the conduct was intended to bring about an unlawful strike but only that an unlawful strike is a reasonable and probable consequence of the act. This sweeping prohibition, however, is expressly qualified by subsection (2), making it inapplicable where the act in question is done in connection with a lawful strike or lock-out.

26. The prohibition in section 67 is broad enough to enjoin any form of picketing not done in connection with a lawful strike and causing other employees to engage in an unlawful strike. Section 65, on the other hand, is only wide enough to catch such picketing where it can be characterized as counselling, procuring, supporting or encouraging of that strike by a union, council of unions, or trade union officials. It would be somewhat incongruous if, when the more comprehensive prohibition against picketing is rendered inapplicable, the less comprehensive prohibition remains operative. The result would be a situation where the Board could restrain picketing in connection with a lawful strike where official union support for that picketing is present, but not in those cases where this element has not been established.

27. In the Board's view, the Legislature intended section 67 to regulate primarily the conduct of picketing activity. To the extent that section 65 also touches upon picketing, it must be read subject to section 67. Picketing in connection with a lawful strike, therefore, even though it may cause other employees to engage in a strike, does not fall within the conduct proscribed by section 65.

28. This view is consistent with the general approach that this Board has taken in applying those provisions of the Act intended to confine labour disputes, sections 63, 65, 67, and the concomitant remedial provisions, sections 82, 83, and 123. These provisions have been interpreted by the Board as establishing an unqualified restriction upon untimely work stoppages or other disruptions of work of a concerted nature, regardless of their underlying purpose. See *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569, *Nelson Crushed Stone, A Division of King Paving and Materials, A Division of Flintkote of Canada Ltd.*, [1977] OLRB Rep. Nov. 713. The latter decision, involving refusals to cross a picket line set up in connection with a legal strike, is of particular relevance to the broad question raised in this case.

29. In *Nelson Crushed Stone, supra*, the Board made it clear that refusals to cross a picket line would be treated by the Board in the same manner as any other form of work stoppage – the critical question being whether the refusals had assumed a concerted character. It is clear, therefore, that the Board has the remedial authority to deal with unlawful strikes resulting from picketing, even where the picketing itself may be in support of a lawful strike.

30. In view of this Board's wide authority to restrain untimely work stoppages, the need for a wide power to restrain picketing is less apparent. Where the harmful consequences flowing from such picketing can be themselves restrained, it would appear less necessary to restrain the picketing as well. This point assumes even greater significance given the difficulties associated with determining the legitimate scope of picketing in support of a lawful strike.

31. The difficulties can be seen when one examines the common law relating to picketing. Although the Board does not intend to deal in any detail with the common law relating to picketing in support of a legal strike, a quick glance at this body of law reveals the problems that arise when attempting to regulate picketing in support of a lawful strike where that picketing has some secondary impact. For a perceptive analysis of this problem, see Beatty, "Secondary Boycotts: A Functional Analysis" (1974), 52 C.B.R. 388. It is sufficient to say that at common law not all picketing that causes other employees to strike would be regarded as illegal. The Courts have realized that a selective approach to picketing must be taken. Yet, if we were to accept the interpretation of section 65 argued by the applicant, the Board would have to adopt an approach to picketing that would be far too broad in its scope and one which would not be responsive to labour relations realities in this Province.

32. The legislative approach to industrial disputes taken in Ontario contrasts sharply with that found in British Columbia. The *Labour Code of British Columbia* contains express provisions setting out the scope of permitted picketing activity, and giving to the British Columbia Board an extensive jurisdiction to regulate the object, timing and the location of peaceful picketing. See *Canex Placer Ltd.*, [1975] 1 Can. LRBR 269; *Parkland Developments Corporation Ltd.*, [1975] 1 Can. LRBR 339. That Board's jurisdiction to restrain work stoppages is tied closely to its jurisdiction to regulate the "why", "where", and "when" of picketing. Refusals to cross picket lines in British Columbia, as a general rule, are not considered to fall within the definition of a strike contained in their Code. The British Columbia Board, in *MacMillan Bleodel Packaging Ltd.*, [1976] 1 Can. LRBR 90, held that under their statutory definition of a strike a concerted work stoppage to be a strike must be for the purpose of compelling an employer to settle a dispute about terms of employment – a motivation that the British Columbia Board considers to be absent where employees refuse to go to work because of the presence of a picket line. In British Columbia, therefore, employees who refuse to cross picket lines in concert are not considered to be on strike.

33. The conclusion reached in British Columbia about the lawfulness of a refusal to cross a picket line flows naturally from a statutory scheme that places emphasis upon the regulation of picketing. Where picketing is permitted, refusals to cross the picket line, regardless of their concerted nature, are also permitted. Regulation of industrial conflict in British Columbia, then, is accomplished primarily by regulation of the picket line, rather than by regulation of the consequences flowing from it.

34. In Ontario the legislative emphasis has been in a different direction, focusing upon the lawfulness of strike activity, rather than upon picketing. A concerted refusal to work is considered to be a strike regardless of whether it is in response to the presence of a picket line. Moreover, picketing not in connection with a lawful strike that causes other employees to strike, is considered to fall within the prohibitions set out in section 65 and 67. Falling outside of these provisions, however, is picketing done in connection with a lawful

strike. If such picketing causes other employees to engage in an illegal strike, then that illegal strike, but not the picketing that causes it, can be the subject of a Board direction. This conclusion does not necessarily mean that such picketing is permitted by the general civil and criminal law. Rather, it simply means that picketing done in connection with a lawful strike is not touched directly by the Board's remedial authority as set out in the *Labour Relations Act*. Accordingly, if persons wish to restrain such picketing, they must seek their remedy in the Courts.

35. The picketing that is the subject of this application, in the Board's view, has been done in connection with a lawful strike. The pickets that appeared at Windsor and Cambridge represented the Toronto employees who were engaged in a lawful strike against the applicant. The striking Toronto employees were clearly attempting to resolve that dispute by asserting greater pressure upon the applicant through picketing its other operations. In these circumstances, the Board must conclude that the picketing was done in connection with a lawful strike.

36. Having reached this conclusion, the Board finds that it does not have the remedial authority to issue a direction restraining the picketing that occurred in this case. Accordingly, the Board dismisses the first part of the application seeking a direction restraining any picketing at the applicant's Cambridge and Windsor locations. The second part of the application, however, seeking a direction requiring the respondent union to instruct its members employed at the Windsor location to return to work does appear to fall within the Board's remedial authority. The issues relevant to that aspect of the application are whether the Windsor employees engaged in a strike and, if so, whether it was called or authorized by the respondent trade union.

37. This matter will be continued at a date to be set by the Registrar.

0140-77-R Frank Newbold and Stanley Ofrecht, (Applicant), v. United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C., (Respondent), v. **Custom Aggregates**, (Intervener).

Termination – Representation Vote – Effect of employer employing, retaining and recalling strike replacements for the purpose of influencing a representation vote taken during a strike

BEFORE: Arthur Haladner, Vice-Chairman and Board Members J.D. Bell and D.B. Archer.

APPEARANCES: Frank Nowak for the applicant; James Hayes and Eric Batten for the respondent; E. Rovet, F.R. Von Veh and John Elliott for the intervener.

DECISION OF THE BOARD: March 23, 1978.

1. In this matter, a hearing was held for the purpose of hearing representations as to whether or not certain persons were eligible to cast ballots in the representation vote which

was ordered by the Board pursuant to section 49(3) of The Labour Relations Act. Prior to the hearing, the respondent wrote to the Board and complained that the intervener, which had been strike-bound since August of 1976, "had merely employed a sufficient number of replacement employees to outnumber the striking employees for whatever period and count was required." The relevant factual background, as it emerged from the numerous proceedings which have taken place in connection with this matter, is set out below.

2. The intervener owns and operates a gravel pit in Aberfoyle. On April 21, 1975, the respondent was certified for an all-employee unit at that pit, exclusive of office staff and students. Negotiations for a first contract proved unsuccessful; and on August 12, 1976, ten of the thirteen employees then in the bargaining unit commenced a lawful strike. The strike succeeded in bringing all shipments of product to a halt. However, production continued until the winter of 1976 using the three non-striking employees.

3. In the spring of 1977 (March and early April) the intervener hired eight persons as replacements for the striking employees. Some of these strike replacements were from out of province, having been obtained through an agency. On April 22, an application for termination was filed with the Board. On May 9, the Board held a hearing at which it conducted its normal enquiry into the circumstances surrounding the origination and circulation of the petition for termination. On the evidence before it, the Board judged the petition to be voluntary; and on May 10 a Labour Relations officer was appointed to enquire into the list of employees filed by the intervener. There then ensued a protracted set of proceedings before the Labour Relations Officer. The object of the exercise was to determine whether certain named individuals were employees in the bargaining unit at the time the application for termination was made and, thus, whether the applicant had sufficient support for entitlement to a representation vote pursuant to section 49(3) of the Act. The respondent challenged the status of four persons on the list of employees filed by the intervener. The intervener and/or the applicant challenged the status of five of the ten persons (the strikers) added to the list on the motion of the respondent.

4. On September 2, 1977, the Board held a hearing for the purpose of hearing representations as to the conclusions it should reach in view of the Officer's report, which was dated August 5, 1977. On August 31, two days before that hearing, the intervener recalled seven employees. (These employees had been laid off by the intervener on or about June 29, 1977.) When two of the employees did not report as requested, and a third "disappeared" shortly thereafter, four new employees were hired. This brought the intervener's complement of employees to twelve, a level at which it remained until the first week of December when the one individual who had disappeared was recalled – by the intervener's own admission, for voting purposes.

5. On October 3rd, the Board received written submissions from the parties in respect of those portions of the Labour Relation Officer's report which had not been dealt with at the September 2nd hearing. On November 18th, the Board determined that the applicant had sufficient support for entitlement to a representation vote and referred the matter to the Registrar. The vote took place on December 13, 1977. On December 15th, the intervener laid off, for an indefinite period, eight of the thirteen persons then in its employ. In addition, it terminated the "employment" of three persons who had been recalled the week of December 13th, and placed on the intervener's payroll also, by the intervener's own admission, for voting purposes. These three individuals, all of whom had terminated their em-

ployment with the intervener prior to December, were recalled, and placed on the intervener's payroll, to put it kindly, in the mistaken belief that they were eligible to vote.

6. At the hearing, counsel for the respondent called as its first witness the president of the intervener, John Elliott. Mr. Elliott testified that the replacements which were hired in the spring of 1977 were used to build up the employer's stock-piles which were then at less than one-quarter capacity. He told the Board that a substantial number of employees were laid off in June and July when full capacity was reached. The recalls and new hires which occurred on August 29th and thereafter were necessary, Mr. Elliott said, in order to allow the intervener to prepare for winter. His evidence was that the employees were used to convert intermediate stock-piles into final stock-piles and also to do winter maintenance work which, because of the lack of production, could be done more cheaply at that time.

7. Mr. Elliott, however, was quite candid in admitting that the termination proceedings influenced the August 31st build-up of the intervener's work force. His evidence was that some arithmetic was involved in the decision as to how many employees would be recalled and hired. Mr. Elliott was equally candid in admitting that the eight persons placed on indefinite lay-off on December 15th were continued in employment up to that date so that they would be available to vote. He stated that "had it not been for the vote on December the 13th, we would probably have laid off about December 1st, but knowing that the vote was coming up, we kept them over." It should be noted here that the uncontradicted evidence of the respondent established that, in the past, the intervener had been able to prepare for winter in approximately two weeks, using four or five employees.

8. It is, as the Board noted in *Becker Milk Company Limited*, [1977] OLRB Rep. Dec. 797, a well established principle of industrial relations law in Ontario that an employer has the right to hire replacements in order to continue operations during a strike. The policy underlying this principle is reflected in the following passage from the Woods Task Force on Canadian Industrial Relations (at page 176):

"It is important to note that the employer's capacity to take a strike depends largely on his right to stock-pile goods in advance of a strike and to use other employees and replacements to perform work normally done by strikers. Together with the lock-out these possibilities constitute the employer's *quid pro quo* for the worker's right to strike..."

There is, however, a clear distinction between the use of strike replacements for the purpose of performing the work normally done by strikers and the use of replacements for the purpose of influencing the outcome of a representation vote. Contrary to the position advanced by counsel for the intervener in this matter, an employer is no more permitted to artificially build up its work force in the period following the making of an application for termination than it is permitted to assist in the origination or circulation of a petition. Such conduct constitutes improper interference with the freedom which The Labour Relations Act guarantees to employees to select or reject a bargaining agent free from interference on the part of their employer. As the Board stated in *Peel Block Co. Ltd.*, 63 CLLC, ¶16264:

"It is the purpose and spirit of the Act when employees embark upon a course of action looking to the selection or rejection of a bargaining agent that they are entitled to choose and act free from the improper

influence of their employer. What is always to be determined in this respect are the true wishes of the employees, not those of the employer who may be seeking to improperly influence them. Attempts by employers to improperly influence or to interfere with the freedom of employees to select or reject a trade union as bargaining agent must always be condemned and discouraged by this Board. It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent."

9. The Board, having regard to all of the evidence and, in particular, to the timing of the August 31st build up of the intervenor's work force – just two days before the earliest date at which a decision ordering a representation vote could have been expected – and to the subsequent decline of that force on December 15th – just two days after the vote – as well as to the evidence of the intervenor's president, John Elliott, must conclude that the employer in this case has not structured its work force in response only to the exigencies of the strike. The Board can only conclude that the work force has been artificially built up with a view to influencing the outcome of the representation vote. The Board is prepared to accept Mr. Elliott's evidence that the strike replacements hired in the spring of 1977 were necessary in order to bring the intervenor's stockpiles to full capacity. However, there can be no doubt – indeed, it was admitted by Mr. Elliott – that the presence of 13 persons on the intervenor's payroll as of December 13th, the day of the representation vote, cannot be justified on legitimate business grounds. The conclusion is inescapable that the employer has padded the list of eligible voters with persons who, because they were hired during the course of a strike, and as replacements for striking employees, could almost certainly be counted upon to vote against the union. Although the Board is not prepared, on the evidence before it, to find that the votes of the strike replacements were, in effect, "bought" votes – that was the position urged upon us by counsel for the respondent – the fact remains that at least eight persons, namely, the eight persons placed on indefinite lay-off on December 15th, have cast ballots who, in the normal course, would not have been permitted so to do. The long standing practice of the Board is not to allow persons on indefinite lay-off to cast ballots in representation votes, the Board having taken the view that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. (See, for example, *Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. June 127, *Fleron Lumber Company Limited*, [1970] OLRB Rep. Nov. 820.)

10. It follows from the foregoing that the constituency of eligible voters, as of December the 13th, was not a representative one. Accordingly, the Board, pursuant to section 92(5) of The Labour Relations Act, directs that a new vote be taken. Those eligible to vote are all employees of the intervenor in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

11. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Custom Aggregates.

12. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER J.D. BELL

I disagree with the decision of the majority of the Board that the eight persons placed on indefinite lay-off on December 15, 1977 would not normally have been permitted to cast ballots in the December 14th representation election directed by the Board. These persons were in an employment relationship on the day of the vote and cannot be denied the opportunity to exercise their rights under section 49(3) of The Labour Relations Act.

Persons who returned for the one day only, in order to vote, should be denied such privilege as they are not in compliance with the eligibility rules. Their ballots must be destroyed and then I would direct that the remainder be counted.

0901-76-U Local 550, Canadian Food and Allied Workers Chartered by the Amalgamated Meat Cutters and Butcher Workmen, (Complainant), v. **Culverhouse Foods Incorporated**, (Respondent).

Reconsideration – Effect of employer refusal to reinstate illegally discharged employees for more than a year following Board's order – Effect of pending judicial review – Whether Board will vary compensation order so as to redress additional financial loss resulting from non-compliance.

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. H. Wightman and O. Hodges.

APPEARANCES: *H. Goldblatt, Irv Dawson and Julius Hoebink for the applicant; R. E. Folkes for the respondent.*

DECISION OF THE BOARD; March 29, 1978.

1. On January 21, 1977 the Board ordered the respondent in this complaint to forthwith reinstate the grievors with compensation for their loss of income to the date of the Board's order. By letter dated February 2, 1978 counsel for the complainant requested the Board to reconsider its order in light of events which occurred after it issued.

2. It is common ground that the grievors were not reinstated forthwith after the Board's order of January 21, 1977. The employer did not offer them reinstatement until September 14, 1977, and their first opportunity to return to work was on September 19, 1977. At that time the respondent took the position that compensation should be paid to the employees in question for the loss of their wages only to January 21, 1977, being the date of the Board's order and not for the eight-month period during which their reinstatement was delayed, being from January 21, 1977 to September 19, 1977. The union asks the Board to reconsider its earlier order so as to make the computation of compensation referable to the actual date of reinstatement, rather than to the date of the Board's first order. It submits that if the order is not varied as requested the employees will be the victims of the respondent's refusal to promptly implement the Board's reinstatement order, no less than they were the victims of the unfair labour practices that gave rise to that order.

3. The Board's jurisdiction to reconsider its decision is well established. Its authority to do so is found in section 95 of The Labour Relations Act:

95. – (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

4. In recognition of the value of certainty and finality in the disposition of rights between competing parties the Board has applied principles similar to those adopted by the courts to limit the unwarranted re-opening of adjudicated issues. Generally reconsideration will not be granted unless a party proposes to tender new evidence which through the exercise of due diligence was not available to it prior to or at the time of the hearing, and then only where that evidence, if accepted, would be practically conclusive. The Board may likewise reconsider where a party raises objections or makes representations which it did not previously have the opportunity to make. (*National Steel Car Corporation Limited* [1976] OLRB Rep. Apr. 55, *York University* [1976] OLRB Rep. Apr. 187 affirmed, sub-nom. *re William A. Jordan, The Ontario Labour Relations Board et al.*, Supreme Court of Ontario (Div.Ct.) Feb 1. 1977).

5. At the hearing held on the reconsideration issue the respondent's counsel sought to explain the delay of reinstatement of the employees as being related to its pending application for judicial review of the Board's order of January 21, 1977 before the Divisional Court of the Supreme Court of Ontario. It should be noted that an application to quash the Board's order was made pursuant to the Judicial Review Procedure Act, 1971 on February 16, 1977. One of the grounds upon which relief is sought is an alleged reasonable apprehension of bias in two members of the panel seized of the instant application. The Board, in the reconsideration proceedings, asked counsel for the respondent whether, in light of the allegations made in its application for judicial review, the respondent requested that any member or members of the panel stand down for the purposes of the reconsideration proceedings. He replied that it did not. It may be added that no request of disqualification or allegation of reasonable apprehension of bias was made by the respondent before this Board in the proceedings that led to the original order of January 21, 1977.

6. On July 28, 1977 the respondent moved in the Supreme Court of Ontario for a stay of the Board's proceedings in respect of its decision of January 21, 1977. That application was to stay a show cause hearing scheduled before the Board on July 29, 1977. The purpose of the scheduled hearing was to permit the complainant to establish the respondent's alleged non-compliance with the Board's order, something which the complainant must apparently do prior to seeking enforcement of that order by registration in the Supreme Court of Ontario, (see section 79(5) of The Labour Relations Act and *Re United Steelworkers of America and Chairtex Manufacturing Ltd. et al.* [1971] 3 O.R. 154 (C.A.)). The application for a stay was denied by the Court.

7. The applicant subsequently established the respondent's non-compliance and

filed the Board's decision in the Supreme Court of Ontario on August 2, 1977. When the union then filed a notice of motion for committal, sequestration and fines against the employer, the respondent again sought a stay of proceedings. That second application for a stay was dismissed by Labrosse, J. on August 31, 1977. It was only when its application was dismissed and the matter was adjourned to September 14, 1977 by Labrosse, J. to allow the respondent to comply with the Board's order that the respondent made its offer of reinstatement to the grievors on September 14, 1977, the deferred returnable date of the motion for committal, sequestration and fines.

8. A subsequent application by the respondent to stay the instant reconsideration proceedings was filed in the Supreme Court Chambers and dismissed on March 16, 1978. Following that dismissal, on the same day, we proceeded to hear the application for reconsideration.

9. The relevant part of the order being reconsidered is as follows:

32. The respondent is ordered to forthwith reinstate the grievors to the positions which they held in the plant at Vineland Station where they were employed as full time employees by Culverhouse Foods Limited, at the wage rates provided in the collective agreement. The grievors shall therefore be reinstated forthwith as full time employees within the meaning of Article 1 of the said collective agreement, and not as seasonal employees.

33. The respondent is further ordered to compensate the grievors for wages to which they would have been entitled under the collective agreement, with appropriate allowance for periods during which they would have been normally and in good faith laid off by the respondent as they had occasionally been laid off by Culverhouse Foods Limited and with allowance for wages which they have earned elsewhere. For all of the grievors but William Boyd such compensation shall be calculated from May 28, 1976 to the date of this Order. With respect to Mr. Boyd compensation shall, subject to the aforementioned allowances, be calculated from July 1, 1976 to the date of this Order.

34. The Board shall remain seized of this matter in the event of any disagreement between the parties respecting the interpretation or implementation of this Order.

10. It should be emphasized that we are not asked to give clarification as to the interpretation or implementation of the order, a purpose for which we retained jurisdiction, but rather to reconsider and vary its terms, so that compensation is made payable to each of the grievors up to September 19, 1977, rather than to the date of the original order. We do not accept the submission of counsel for the respondent that having retained jurisdiction in respect of interpretation and implementation, we are without jurisdiction to reconsider and vary the order. The retaining of jurisdiction is merely an expedient by which a tribunal can avoid becoming *functus officio* in respect of a dispute before it. Thus it can remain available to assist either party in resolving the details of the final disposition if needs be. By adopting that expedient the Board does not, and indeed cannot, divest itself of the statutory authority

vested in it by the Legislature to reconsider, vary or revoke any decision, order, direction or ruling that it has made.

11. The Board's unanimous finding in its decision of January 21, 1977 was that the respondent had breached The Labour Relations Act by its unlawful refusal to employ the grievors. The intent of the Board's remedial order was that the grievors should be made whole and saved from any loss of income attributable to the respondent's breach of the Act. That would have happened if, as the order contemplated, they had been immediately reinstated in their employment and had been paid compensation to that time. The Board's order was not made in contemplation of a refusal of the employer to comply and a resulting eight-month delay in the reinstatement of the employees causing further financial loss to the grievors.

12. Where events subsequent to the making of a remedial order by the Board show that order to be clearly inappropriate the Board may use its jurisdiction to reconsider in order to rectify an unforeseen problem. (*R. v. OLRB ex p. Genaire Ltd.* [1958] O.R. 637 (Ont H.C.); *aff'd.* [1959] O.W.N. 149 (C.A.), *The Journal Publishing Company of Ottawa Limited* [1977] OLRB Rep. Sept. 549 and *cf. Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi et al.* [1966] S.C.R. 282). In our view the facts at hand fall squarely within that principle. The respondent, is, of course, entitled to seek review of the earlier decision of this Board in the Supreme Court of Ontario, but there is no sound reason in labour relations policy that its decision to do so should result in uncompensated financial loss to the grievors in these proceedings.

13. For these reasons paragraph 33 of the order of the Board dated January 21, 1977 is hereby revoked and the following substituted therefor:

33. The respondent is further ordered to compensate the grievors for wages to which they would have been entitled under the collective agreement, with appropriate allowance for periods during which they would have been normally and in good faith laid off by the respondent as they had occasionally been laid off by Culverhouse Foods Limited and with allowance for wages which they have earned elsewhere. For all of the grievors but William Boyd such compensation shall be calculated from May 28, 1976 to September 19, 1977. With respect to Mr. Boyd compensation shall, subject to the aforementioned allowances, be calculated from July 1, 1976 to September 19, 1977.

14. The Board continues to remain seized of this matter in the event of any disagreement as to the quantum of compensation payable.

1334-77-U; T-87-76 Anthony Frank Amis, a member of Local 598 of The Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada, (Complainant), v. **Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada**; General President Joseph T. Power; and Local 598 Trustee William E. McMynn, (Respondents) **The Operative Plasterers' and Cement Masons' International Association of The United States and Canada**, (Applicant), v. Frank Amis and Zygmunt Jedrasik, (Intervenors).

Trusteeship – Whether Board should extend trusteeship beyond twelve months – Whether Board may grant permission to extend trusteeship after twelve month period has already expired.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members O. Hodges and W. H. Wightman.

APPEARANCES: *Robin B. Cumine, Q.C. and Frank Amis appearing on behalf of the complainant in File No. 1334-77-U and on behalf of the intervenors in File No. T-87-76; Stanley Simpson and W. McMynn appearing on behalf of the respondents in File No. 1334-77-U and the applicant in File No. T-87-76.*

DECISION OF THE BOARD; March 2, 1978.

1. These two matters are hereby consolidated pursuant to section 56 of the Board's Rules of Procedure.

2. These proceedings relate to the assumption by the Operative Plasterers' and Cement Masons' International Association of The United States and Canada ("the International Union") of supervision or control over one of its subordinate locals, namely its Local 598. This supervision or control takes the form of a trusteeship over Local 598 apparently in accordance with the provisions of the International Union's constitution. Mr. Amis is a former officer of Local 598 and at the time of the filing of his complaint in File No. 1334-77-U was a member of the local. Mr. Jedrasik appears to be a member and former officer of the local.

3. There is some disagreement as to the date on which Mr. William McMynn, the person appointed by the International Union to act as trustee of Local 598, actually assumed direct control over the affairs of the local. However, it is uncontested that at the very latest Mr. McMynn assumed such control on July 14, 1976. The trusteeship has not to date been brought to an end through the actions of the International Union, nor has the Board granted its consent to the continuation of the trusteeship past its first 12 months of operation.

4. These proceedings concern the provisions of section 73 of The Labour Relations Act. The section is set out in full below:

73. – (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby

the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers; setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

5. On November 23, 1977 Mr. Amis filed a complaint with the Board under section 79 of the Act, (File No. 1334-77-U) wherein he complained that the International Union, the General President of the International Union and Mr. McMynn, the trustee of Local 598, had violated section 73(2) in that they had continued exercising control over the affairs of the local for a period in excess of 12 months without first obtaining the necessary consent of the Board. By way of relief Mr. Amis in his complaint requested that "the International Union and its appointed Trustee be ordered to immediately release control of Local Union 598 via a local union election, so that the local union may be returned to self government." On December 20, 1977 the International Union filed with the Board an application for consent to continue the trusteeship until July 14, 1978.

6. At a hearing into these matters held on January 20, 1978 it became apparent to the Board that the positions of the parties had altered somewhat from those set forth in their initial filings. In particular, counsel for the International Union indicated that the International Union was no longer seeking a lengthy extension of the trusteeship but instead was seeking an extension long enough only to allow elections to be held for local officers so that the trusteeship could be brought to an orderly end. Counsel for Mr. Amis, on the other hand, indicated that Mr. Amis was no longer seeking an immediate election of officers. He asserted that the trusteeship had automatically come to an end once 12 months had elapsed from the date of its commencement and that the Board now lacked jurisdiction to grant its consent to any extension. If counsel is correct in this contention, it would appear that the local is now without either an elected executive or an appointed trustee with clear authority to manage the affairs of the local. At the hearing the Board was also informed that Mr. Power, the General President of the International Union, had purported to withdraw Mr. Amis' membership in the union.

7. Having regard to the changing factual situation and the accompanying shifting in position of the parties, the Board at the hearing became of the view that these proceedings might be expedited, and the parties better able to assess their positions, if the jurisdiction of the Board in situations such as this were to be clarified. This being the case the Board invited counsel to make submissions on the general question of whether or not the Board could consent to the continuation of trusteeship after 12 months had elapsed from the time of its commencement.

8. Counsel for Mr. Amis contended that the Board lacked the jurisdiction under section 73(2) to take any such action. He submitted that unless consent were obtained from the Board during the initial 12 months of a trusteeship, the trusteeship automatically lapsed at the end of the twelfth month and that the Board had no jurisdiction thereafter to consent to its continuation. Counsel for International Union, on the other hand, took the position that the Board could grant its consent “nunc pro tunc” to the continuation of a trusteeship even after the initial 12 months period of the trusteeship had elapsed.

9. In that section 73 does not address itself to the question of whether the Board’s consent to the continuation of a trusteeship must be obtained prior to the end of the first 12 months of the trusteeship’s operation, it might be useful to take a general look at the purpose and operation of the section.

10. Section 73(1) requires that when a trade union places a subordinate local under trusteeship (using that term to refer to all manner of supervision and control) it must file certain information concerning the trusteeship with the Board. The Act, however, places no impediments or constraints on a union when it places a local under trusteeship. This lack of impediments or constraints would appear to reflect a recognition on the part of the Legislature that most trusteeships are imposed as a result of real and legitimate concerns on the part of the union involved. For example, a trusteeship may be imposed because of mismanagement or dishonest use of local funds, because a local has become so torn by dissent that it cannot function properly, or perhaps to remove officers who have either become dictatorial or who have failed to administer the local in a responsible manner. At times, particularly with small locals, a trusteeship may be imposed simply because none of the members of the local are willing to assume the responsibilities of elected office.

11. The Legislation recognizes that trusteeships generally have a legitimate purpose, but it also places restrictions on their duration. Trusteeship is inevitably accompanied by a restriction on the ability of the local’s membership to participate in the government of the local or to have a say in the policies adopted by the local. The longer the trusteeship is allowed to continue the more serious will become the resulting denial of self-government and the greater will the likelihood that the policies and practices adopted by the local will not be reflective of the wishes of the local’s membership.

12. In essence then, section 73 appears to be an attempt by the Legislature to balance the legitimate interests of a union which may require the suspension of a local’s autonomy against the desirability of local self-government through officers elected by, and responsible to, the local membership. The section allows a full twelve months in which a union can resolve the problems which led to the trusteeship being imposed. The very existence of such a time limit should prompt responsible union officials to move with reasonable dispatch to correct the problems which led to the imposition of trusteeship. The section, however, also makes allowance for the fact that not every problem which leads to a trusteeship being imposed may be able to be resolved in 12 months, and thus some flexibility has been provided by stipulating that trusteeships can be continued for a further period of 12 months with the consent of the Board. Because of the Act’s obvious concern with the length of trusteeships, the most reasonable interpretation of the section is not that a trusteeship must be extended for a further 12 month period in every case, but rather that it can be extended for any period of time up to 12 months. This is clearly the view which was adopted by the Board in *The United Brotherhood of Carpenters and Joiners of America* case, [1972] OLRB Rep. Sept.

833 where just prior to the expiration of the first 12 months of a trusteeship the Board agreed to the continuation of the trusteeship until such time as it issued a further decision in the matter. Approximately 4 months later the Board issued a second decision wherein it refused to grant its consent to any further continuation of the trusteeship.

13. A union which requests the consent of the Board to a continuation of a trusteeship always faces the possibility that such consent may not be granted. In some instances – particularly where a local executive exists or where there is sufficient time to conduct local elections before the end of the initial 12 month period – a refusal on the part of the Board to any continuation of a trusteeship might not result in any serious disruption in the local's affairs. However, where there is no local executive and little or no time available in which to conduct elections, a refusal to consent to a continuation might well result in a serious upheaval in the affairs of the local. Another possibility is that the Board in certain circumstances might become of the view that a lengthy continuation of a trusteeship would not be justified but that it should grant its consent to a continuation solely for the purpose of allowing the trusteeship to be brought to an orderly end.

14. With this general discussion in mind, we now turn to the central issue before us, namely whether the Board can grant its consent to the continuation of a trusteeship after 12 months have elapsed from the time that the trusteeship was first imposed. Should the Board adopt the position that it cannot do so, any union which filed an application for consent to continue a trusteeship after the 12 months would automatically have its application dismissed, even though had the application been filed earlier the facts involved might have justified the Board granting its consent to a continuation either because of the continuing existence of serious problems within the local or because additional time was required to allow the trusteeship to be brought to an orderly end. The inability of the union to continue the trusteeship in such a situation might well result in the local being left in a state of disorder, without either an elected executive or anyone else possessing clear authority to administer the local's affairs or to ensure that it fulfills its statutory duties as a bargaining agent. This type of situation to our minds would not be in the interests of either the local or the members of the local and it certainly would not further the interests of stable industrial relations.

15. As opposed to the above approach, if we were to adopt the interpretation contended for by counsel for the International Union the Board would be in a position to deal with every request for consent to a trusteeship continuation on its merits, and thus be able to provide the flexibility of approach which section 73 clearly aims at. To our minds this is very much the preferred interpretation of the section and, lacking any restrictions in the statute as to when the Board's consent to a trusteeship continuation can be given, it is the interpretation which we are disposed to accept. This being the case, we are of the view that the Board can give its consent to the continuation of a trusteeship even after 12 months have elapsed from the time that the trusteeship was imposed.

1334-77-U; T-87-76 Anthony Frank Amis, a member of Local 598 of The Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada, (Complainant), v. **Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada**; General President Joseph T. Power; and Local 598 Trustee William E. McMynn, (Respondents) **The Operative Plasterers' and Cement Mason's International Association of The United States and Canada**, (Applicant), v. Frank Amis and Zygmunt Jedrasik, (Intervenors).

Trusteeship – Whether Board should extend trusteeship beyond twelve months – Whether Board may grant permission to extend trusteeship after twelve month period has already expired

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members O. Hodges and W.H. Wightman.

DECISION OF THE BOARD; March 17, 1978.

1. An earlier decision was issued by the Board in these proceedings on March 2, 1978.
2. As noted in the earlier decision The Operative Plasterers' and Cement Masons' International Association of the United States and Canada ("the International Union") has requested the Board's consent to the continuation of a trusteeship over its Local 598 pursuant to the provisions of section 73(2) of The Labour Relations Act.
3. An "emergency trusteeship" was imposed by the International Union on the local on May 20, 1976, and this was superseded on July 14, 1977 by a "regular trusteeship." The Board is of the view that the imposition of the "emergency trusteeship" on May 20, 1976 amounted to the assumption by the International Union of "supervision or control over a subordinate local" within the meaning of section 73 of the Act. It follows from this that, pursuant to the wording of sub-section 2 of section 73, the Board can only consent to a continuation of the trusteeship until May 19, 1978.
4. Local 598 is at present without an elected executive. Should the trusteeship be brought to a sudden end there would be no person or body possessing clear authority to manage the affairs of the local. Further, having regard to the recent history of the local, the Board is satisfied that this is not a case where one might reasonably assume that if left to its own devices the membership-at-large of the local would be capable of ensuring that the affairs of the local be conducted in an orderly manner.
5. The Board is of the view that the trusteeship over Local 598 should be brought to an end. However, the Board is also satisfied that ending of the trusteeship should be carried out in an orderly manner through the election of local officers. To achieve these results the Board is prepared to grant its consent to the continuation of the trusteeship but only so that the International Union will have an opportunity to now conduct local union elections and bring the trusteeship to an orderly end.

6. Accordingly, the Board hereby grants its consent to The Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada to continue its supervision or control over its Local 598 until May 19, 1978, on condition that the International Union move with all reasonable dispatch to ensure the conduct of local union elections and the bringing of the trusteeship to an orderly end.

0594-77-JD Eaman Riggs Limited, (Complainant), v. Sheet Metal Workers' International Association, Local 537, and International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Respondents).

Jurisdictional Dispute – Evidence – Whether request by trade union to assign work to its members – Effect of availability of arbitration to resolve aspects of the dispute – Effect of reference to Impartial Jurisdictional Dispute Board in Washington – Whether Board is without jurisdiction to entertain complaint – Government official giving evidence but pleading executive privilege on cross examination – Whether evidence in chief must be disregarded – Effect of Apprenticeship and Tradesman's Qualification Act and decision certifying work in question as sheet metal workers' work

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *R. A. Werry appearing for the complainant and The Master Insulators' Association of Ontario; Stanley Simpson and J. Fletcher appearing for the Sheet Metal Workers' International Association, Local 537; A. M. Minsky and L. Richmond appearing for the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95; and D. I. Wakely and Alex D. Lundy appearing for Arthur G. McKee Company of Canada Limited.*

DECISION OF THE BOARD; March 10, 1978.

1. The complainant has requested the Board to issue a direction under section 81 of The Labour Relations Act with respect to the assignment of certain work. This work consists of:

All work in connection with the installation of aluminum jacketing (up to .016 inch thickness) of insulation of piping and equipment and fabrication and installation of aluminum fittings for insulation jacketing up to .016 inch thickness and all work related or incidental thereto at the project of Eaman Riggs Limited at the Texaco Refinery in Nanticoke.

2. The Sheet Metal Workers' International Association, Local 537 ("Local 537") raised three preliminary matters in connection with this complaint. The preliminary matters are as follows:

1. The respondent has never asked for nor are they interested in an assignment of work from Eaman Riggs Limited. Accordingly, the Board is without jurisdiction to entertain this complaint under section 81 of the Act.

2. In the alternative Eaman Riggs Limited has already made a jurisdictional dispute complaint claim with the Impartial Jurisdictional Disputes Board in Washington by date of July 5, 1977, asking it to make a decision on the same work between the same two unions involving the same job. Accordingly, the Board is without jurisdiction under section 81 to entertain the complaint.

3. In the alternative the respondent also submits that some of this work has been declared to be the work of sheet metal workers under *The Apprenticeship and Tradesmen's Qualification Act* as a certified trade and the regulations thereunder. This complaint is being made by the complainant to overcome the decision of the Industrial Training Branch of the Ontario Ministry of Colleges and Universities dated June 3, 1977, certifying this to be the work of sheet metal workers.

For these reasons, Local 537 submitted that this complaint should be dismissed without a hearing on the merits.

3. The Board heard evidence and argument on the first preliminary matter and announced at the hearing that for reasons to be given in writing the Board had jurisdiction to entertain the complaint. These reasons are now set forth.

4. The Board heard testimony from Peter Rapin, the project manager for Eaman Riggs Limited ("Eaman") at its project; Alexander Lundy, the area labour relations manager for Arthur G. McKee Company of Canada Limited ("McKee"); and James Fletcher, the business manager of Local 537.

6. McKee has sub-contracted the work in dispute to Eaman. Local 537 claims to have a collective agreement with McKee. The International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 ("Local 95") and the Master Insulators' Association of Ontario, Incorporated ("the Association") are parties to a collective agreement which became effective on July 7, 1975, and which remains in effect until April 30, 1979. Eaman is a member of the Association and is bound by this collective agreement. Eaman has assigned the work in dispute to members of Local 95.

6. On January 19, 1977, Mr. Rapin, on behalf of Eaman and at the request of McKee, conducted a pre-job conference at the Hamilton Building Trades Council. A representative of the Hamilton Building Trades Council and representatives of six construction trade unions were present at the conference. Among those present were Mr. G. Ward from Local 537 and Mr. J. Duffy from Local 95. Those who were in attendance discussed the McKee/Texaco Insulation Package II job. Eaman made various work assignments to insulators, sheetmetal workers, carpenters and operating engineers. The minutes of the conference indicate, in part, as follows:

WORK ASSIGNMENT:

INSULATORS –

Handling of all insulation material including aluminum jacketing up to .016" thick

Insulation of all piping and equipment

Aluminum jacketing of insulation up to .016" thick – Disputed by sheetmetal workers

Fabrication and/or installation of aluminum fittings for insulation jacketing up to .016" thick – Disputed by sheetmetal workers

Scaffolding to gain access for insulation up to 14 ft. high.

7. The Board is not prepared to find that merely by attending the conference and disputing certain aspects of the assignment Local 537 was requiring Eaman to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section 81(1) of The Labour Relations Act.

8. On February 10, 1977, Mr. Fletcher and Mr. Ward, a business representative for Local 537, visited the project and spoke to Mr. Rapin. Although Mr. Rapin was unable to recall the words used by Mr. Fletcher, he testified that he was under the impression that Mr. Fletcher was hoping for or expecting a change in the work assignment from members of Local 95 to members of Local 537. Mr. Rapin gave evidence that on this occasion Mr. Fletcher indicated that he was following up on the objection or dispute by Local 537 at the pre-job conference. Mr. Rapin responded and told Mr. Fletcher that he was not prepared to change the work assignment.

9. On June 28, 1977, Mr. Fletcher again visited Mr. Rapin. On this occasion Mr. Fletcher, who was accompanied by Ron Taylor, an international representative with the Sheet Metal Workers Association, gave Mr. Rapin a copy of a letter dated June 23, 1977, from the Industrial Training Branch of the Ministry of Colleges and Universities. This letter which is addressed to Mr. Fletcher, Mr. Taylor, Mr. Duffy and Mr. A. Kirton, an international representative of the "Asbestos Workers' Union" states:

I refer to the meeting that Mr. Mansell had with you, representatives of Sheet Metal and Insulation Workers on June 13, 1977.

The facts that were recorded in the minutes have been taken into consideration and it is obvious that some of the problems could be jurisdictional. As such, regulations made under the Apprenticeship and Trademen's Qualification Act cannot be used for jurisdictional purposes.

According to the minutes; the following suggestions were offered by Mr. Mansell:

a) That the insulators maintain the straight cladding requiring minimal skill and no sheet metal tools or equipment to be used.

b) That the sheet metal workers install sectional cladding on valves, elbows or tees, and on conditions of fit up requiring bench work or sheet metal tools or expertise on installation.

It is my decision for the purpose of certification, to apply the legislation of item B of the minutes. This decision may be changed as a result of a ruling handed down by a Board dealing with jurisdictional disputes.

10. Mr. Rapin testified that Mr. Fletcher stated that, although the letter was not all that he had hoped for, it was "okay" with him. Mr. Fletcher asked if Mr. Rapin could change the assignment. Once again Mr. Rapin indicated that he would not change his work assignment because he had not heard from the Ministry of Colleges and Universities and would have to check with his head office. Mr. Fletcher responded that he would have to see McKee about the assignment. Mr. Rapin informed the Board that he was aware at the time of the meeting on June 28, 1977, that Local 537 had filed a grievance against McKee. Under cross-examination Mr. Rapin agreed that he had had contact with a Mr. Mansell, an enforcement officer with the Ministry of Colleges and Universities, and believed that such contact had occurred after the meeting with Mr. Fletcher and Mr. Ward on February 10, 1977.

11. Mr. Lundy gave evidence that the first indication of any problem occurred on February 14, 1977, when he received a visit from Mr. Fletcher and Mr. Ward. On that occasion they drew his attention to the pre-job conference with Eaman. One of the topics which the three men discussed was .016 inch aluminum jacketing and Mr. Fletcher said that this kind of work should be performed by a licensed mechanic, namely, a qualified sheetmetal worker. The witness testified that Mr. Fletcher asked him as a representative of McKee to have Eaman put sheetmetal workers on the aluminum jacketing. Mr. Lundy declined to do this because he viewed the situation as a jurisdictional dispute and stated that it should be settled as such.

12. Mr. Lundy testified that on or about February 22, 1977, Mr. Mansell came to the project and said that he had received complaints that work which required certified trades was not being so performed. The latter confirmed that Eaman was involved and that the complaint concerned aluminum cladding. At this point Mr. Lundy contacted Mr. Rapin and told him of Mr. Mansell's presence and asked him to take Mr. Mansell to any part of the project he wished to go.

13. In cross-examination the witness stated that Mr. Mansell had indicated that the complaint had originated with the sheetmetal workers. He also agreed that a grievance had been filed by Local 537 against McKee on April 1, 1977, that he had responded in a letter dated April 6, 1977, and that he had received a letter dated April 12, 1977, from counsel for Local 537. During cross-examination Mr. Lundy produced his memorandum of the meeting of February 14, 1977.

14. Mr. Fletcher gave evidence that he met Mr. Rapin on February 10, 1977. He explained that he went to the project on that date because of the disputes at the pre-job conference. He further explained that until January of 1977, there had been practically no enforcement of *The Apprenticeship and Tradesmen's Qualification Act* on job-sites. Mr. Fletcher gave evidence that in January of 1977, the Ministry of Colleges and Universities had utilized six enforcement officers on job-sites.

15. The witness testified that the foregoing was the background to his visit to the

project on February 10, 1977, and that he went to discuss certification of trades with Mr. Rapin and to see if enforcement officers had been to the project. He informed the Board that he knew that uncertified persons were performing work which should have been performed by sheetmetal workers who are certified under *The Apprenticeship and Tradesmen's Qualification Act*. He discovered that enforcement officers had not visited the project. On February 18, 1977, he filed a complaint with a Mr. Lucas of the Ministry of Colleges and Universities. Between February 28 and May 30, 1977, Mr. Fletcher had numerous telephone conversations with personnel at that ministry and on March 22, 1977, he met Mr. Lucas. On February 23, 1977, an enforcement officer visited the project.

16. Mr. Fletcher testified that during the meeting on February 10, 1977, he told Mr. Rapin that the work in dispute came under the jurisdiction of a certified trade, namely, the sheetmetal workers. The witness gave evidence that during the meeting on June 28, 1977 he showed to Mr. Rapin the letter dated June 23, 1977 from the Ministry of Colleges and Universities and that the latter made a copy of this letter. Mr. Fletcher disagreed that the purpose of the meeting with Mr. Lundy on February 14, 1977, was to ask McKee to put sheetmetal workers on the aluminum jacketing.

17. In cross-examination by counsel for Local 95, Mr. Fletcher conceded that he told Mr. Lundy that the work in dispute should be performed by sheetmetal workers. He also agreed that he went to see Mr. Rapin because he wanted the work in dispute performed by sheetmetal workers. However, he maintained that he did not ask Mr. Rapin for an assignment of the work in dispute from Eaman. When Mr. Fletcher was asked if he wanted such work performed by sheetmetal workers who were employed by Eaman, he was evasive, and, after repeated attempts by counsel for Local 95 to obtain an answer to this question, did not give an unequivocal answer. When asked if the work in dispute had been assigned to members of Local 537 it would have accepted it, he agreed Local 537 probably would have accepted the work in dispute. Mr. Fletcher agreed that the purpose of showing the letter dated June 23, 1977 to Mr. Rapin was because he wanted the work in dispute performed by sheetmetal workers. He further agreed that Mr. Rapin was correct to a certain point when he testified that he was under the impression that Mr. Fletcher was requesting the work in dispute for sheetmetal workers. The witness confirmed that he went to see Mr. Rapin and stated that the work in dispute should be performed by sheetmetal workers. In answer to a question by Mr. Ade, the witness agreed that the work would end up being performed by members of Local 537 because it is the only local trade union of the Sheetmetal Workers International Association in the geographic area affected by this complaint.

18. It was argued on behalf of Local 537 that it was largely a question of fact whether Local 537 had asked for an assignment of the work in dispute within the meaning of section 81. Counsel for Local 537 stated that in looking at the conduct of the parties it becomes a bit of a game to determine what has happened in the dealings between the parties. Local 537 argued that the grievance of April 1, 1977, and the letter from the Ministry of Colleges and Universities dated June 23, 1977, triggered the series of meetings between Messrs. Fletcher, Ward and Taylor and Messrs. Rapin and Lundy. Counsel viewed the conduct of the other parties as attempts to nullify the grievance and cited a series of decisions before boards of arbitration where either a prior determination by this Board on a jurisdictional dispute or a characterization by a board of arbitration of a grievance under a collective agreement as being in essence a jurisdictional dispute had resulted in the trade union which filed the grievance being denied a remedy and compensation under the provisions of its col-

lective agreement. Local 537 pointed out that Mr. Lundy's memorandum made no mention of a request for an assignment of work in dispute. Counsel referred to his letter dated April 12, 1977, in which he stated on behalf of Local 537 that "the union is not asking that this work be assigned to it by Eaman Riggs but rather that you change your subcontractor to one who will comply with the agreement".

19. Counsel for the other parties stressed the uncontradicted evidence of Mr. Rapin that during both meetings with the representatives of Local 537 he stated that he would not or could not change the assignment of work. They argued that there was no need for Mr. Rapin to make such statements unless he was responding to requests by Local 537 to assign the work in dispute to members of Local 537. They pointed out that Mr. Lundy's evidence was clearly to the effect that he was asked to use his influence to have Eaman change the assignment to members of Local 537.

20. It was also pointed out that after the grievance had been filed on April 1, 1977, there was no need for representatives of Local 537 to return to the project on June 28, 1977, with the letter from the Ministry of Colleges and Universities. The Board was urged to take a positive position and regard the course of events between all of the parties as relating to a jurisdictional dispute and not to defer to arbitration.

21. The jurisdiction of the Board to entertain a complaint under section 81(1) is to be determined by the facts before it. On the facts of the instant complaint, the Board finds that while counsel for Local 537 carefully stated in his letter of April 12, 1977, that Local 537, was not asking that the work be assigned to it, the conduct of Mr. Fletcher leads the Board to a different conclusion. It is an example of the saying that "actions speak louder than words". There was nothing to prevent Local 537 from pursuing a grievance against McKee. Equally there was nothing to compel Local 537 to ask Eaman for an assignment for the work on dispute. There was no need for Mr. Fletcher to meet with Mr. Rapin on February 10 and June 28, 1977, either to ascertain whether an enforcement officer had visited the site or to discuss the letter from the Ministry of Colleges and Universities.

22. In our view, Mr. Fletcher's meeting with Mr. Lundy on February 14, 1977, was not a request to have McKee require Eaman to put sheetmetal workers on the aluminum jacketing. That meeting was merely a prelude to the grievance that was filed on April 1, 1977. In this regard, the Board notes that Mr. Lundy's memorandum of the meeting does not refer to any request by Local 537 for an assignment of the work in dispute. In assessing the evidence of Mr. Fletcher and Mr. Lundy, the Board is not prepared to find that Local 537 requested McKee to require Eaman to assign the work in dispute to Local 537.

23. Mr. Fletcher was evasive on the key question in cross-examination of whether he wanted the work in dispute performed by sheetmetal workers who were employed by Eaman. On the other hand, Mr. Rapin's evidence was that he informed Mr. Fletcher on two occasions that he was not prepared to change the work assignment. On cross-examination Mr. Rapin's credibility was not shaken. Having assessed the demeanour of the witnesses, the Board accepts the evidence of Mr. Rapin over the evidence of Mr. Fletcher. In our view Mr. Fletcher conveyed to Mr. Rapin a request that the work in dispute be assigned to members of Local 537 during their meetings. It is significant that Mr. Fletcher did nothing to correct Mr. Rapin's understanding that a request had been made for the assignment of the work in dispute. The Board interprets the meeting of June 28, 1977, as a second request for

an assignment of the work in dispute when Mr. Fletcher was able to furnish an opinion of the Ministry of Colleges and Universities regarding the performance of the work in dispute. On this point the Board notes the testimony of Mr. Fletcher that Mr. Taylor (who was present at the meeting on June 28, 1977) becomes involved in the jurisdictional disputes of local trade unions of the Sheet Metal Workers' International Association.

24. Having regard to the foregoing, the Board finds that Local 537 required Eaman to assign the work in dispute to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section 81(1) of The Labour Relations Act. The Board therefore finds that with reference to the first preliminary matter it has jurisdiction to entertain this complaint.

25. During the argument on the first preliminary matter reference was made to the relationship between the Board's jurisdiction under section 81 and jurisdictional disputes on the one hand and the arbitration of grievances under a collective agreement on the other hand. The Board was urged to take a positive position and regard the course of events between all the parties as relating to a jurisdictional dispute and not to defer to arbitration.

26. The Board is well aware of the sequence of events which frequently occurs where a jurisdictional dispute arises. Typically a general or prime contractor which has a collective agreement with a trade union sub-contracts certain work to a sub-contractor which has a collective agreement with a second trade union. The collective agreement between the general or prime contractor and the first trade union contains clauses which define the jurisdictional claims of the first trade union and prohibit the sub-contracting out of work which is covered by the jurisdictional claims to a trade union other than the first trade union. The general or prime contractor then, either by design or unmindful of the provisions of its collective agreement, sub-contracts work to a sub-contractor which arguably falls within the jurisdictional claims of the first trade union as set out in its collective agreement. The work which the sub-contractor commences to perform arguably falls within the jurisdictional claims of the second trade union as contained in the collective agreement with the sub-contractor. The sub-contractor commences work on its sub-contract with members of the second trade union. The first trade union upon discovering the conduct of the general or prime contractor in sub-contracting work to the sub-contractor has several options which are open to it. Firstly, it may simply file a grievance under a collective agreement and proceed to arbitration. See, for example, the *Dickie Construction Company Ltd.* case, (Board File No. 0706-76-M, unreported decision dated July 6, 1977). Secondly, it may attempt to bring pressure on the general or prime contractor by authorizing or encouraging an unlawful strike by its members who may be working on the job site. In these circumstances, the Board has jurisdiction under section 123(1) to issue a direction on the application of an interested person. See, for example, the *United Brotherhood of Carpenters and Joiners of America, Local 38* case, (Board File No. 7438-74-U, unreported decision dated March 18, 1975). Thirdly, it may engage in or threaten to engage in a strike by reason of the requirement as to the assignment of work or by reason of the assignment of work. In these circumstances the Board may, pursuant to the provisions of sections 81(8) and 81(9), issue an interim order with respect to the assignment of the work with or without a cease and desist direction. See, for example, the *Sheafer-Townsend Limited* case, (Board File No. 7265-74-JD, unreported decision dated February 12, 1975). Fourthly, it may, as in the instant complaint, require Eaman to assign particular work to persons in a particular trade union or in a particular trade.

craft or class rather than to persons in another trade union or in another trade, craft or class. In such circumstances, the Board has jurisdiction to issue a direction pursuant to the provisions of section 81(1) with or without an accompanying cease and desist direction under the provisions of section 81(9).

27. In the circumstances referred to in the preceding paragraph, the Board frequently hears allegations that when the general or prime contractor is faced with the prospect of an arbitration and a claim for damages it then exerts pressure on the sub-contractor to save it harmless against any claim for damages and/or cease work on the sub-contract. This in turn, it is alleged, causes the sub-contractor and the second trade union (with or without an assist from the general or prime contractor) to file a complaint under section 81(1). It is further alleged that these three parties then turn innocent points of contract with the first trade union into a requiring by the first trade union that the employer assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class. Typically, the allegation then continues that where the Board has issued a direction the first trade union's remedy under arbitration has been extinguished. See, for example, the *Deep Foundations Limited* case, [1975] OLRB REP. 175; and *Re Pigott Structures Co. Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 18 10 L.A.C.* (2d) 76.

28. While the Board has been careful to first determine whether it has jurisdiction under section 81(1), see the *Day Sign Limited* case, [1976] OLRB REP. 217, it has adopted a broad approach to the question of jurisdictional disputes. Thus in the *Gryd Construction Inc.* case [1975] OLRB REP. 230, the Board held that while two associations of employers did not have such an interest in a request for a direction under section 81 as contemplated by the courts, they were added by the Board as parties to the complaint and permitted to fully participate in the proceeding. In the *B. N. Tile & Terrazzo Co. Ltd.* case, [1977] OLRB REP. 244, the Board in a request for a direction under section 81 weighed and compared the two approaches of relief under section 112a as opposed to relief under section 81 and concluded that relief under section 81 provided a more basic approach to jurisdictional disputes. At page 245-6, the Board stated:

6. The circumstances relating to the instant complaint and the grievance have previously been considered by the Board in the *Artex Precast Limited* case (Board File #1733-75-JD, unreported decision dated May 28, 1976). In that case an application had been filed under section 112a and a complaint had been filed under section 81. It was argued by the union which had filed the grievance that the Board should dismiss the complaint and entertain the grievance. The Board rejected this argument and in paragraph 7 of that decision stated:

7. With reference to the matters raised by Local 38, the Board finds no reason to entertain this request for a direction. The fact that Local 38 has filed a grievance against Poole does not affect the merits of this request for a direction. The arbitration of a grievance under a collective agreement essentially affects the parties to the collective agreement. When the essence of a grievance appears to be closely related to an assignment of particular work, arbitration

does not provide a forum for other affected trade unions and employers. In these circumstances arbitration merely deals with the symptoms of an assignment of particular work, whereas a complaint under section 81(1) leads to a final and binding resolution of a dispute over an assignment of particular work. The remedies are different and the parties are different. In our view, proceedings under section 81 provide a more basic or elemental approach to disputes which essentially arise out of the assignment of particular work.

29. Boards of arbitration have considered grievances which involved sub-contracting and jurisdictional disputes. Generally speaking such boards have either concluded that the parties to a collective agreement have either agreed to resolve a jurisdictional dispute by a tribunal which they have mutually selected and that the board of arbitration does not have jurisdiction see, *Re Belanger Construction Co. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 2 L.A.C. (2d) 345; *Re Ellis-Don Ltd and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 2 L.A.C. (2d) 376; *Re Operative Plasterers' and Cement Masons', Local 598*, and *Omega Marble Co. Ltd.* 22 L.A.C. 221; and *Re Comstock International Ltd. and International Union of Operating Engineers, Local 793*, 11 L.A.C. (2d) 313; or have interpreted directions by the Board under section 81 as meaning that the board of arbitration does not have jurisdiction to determine the dispute on its merits, see *Re Pigott Structures Co. Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 18*, *supra*. However, there is a reported decision of a board of arbitration where a different approach was adopted and also a related decision, of this Board which has been frequently distinguished by counsel over the years. See *Re Robertson-Yates Corp. Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 18*, 1 L.A.C. (2d) 91 and an additional decision dated October 1, 1974 (unreported); and the *Northdown Drywall & Construction Limited & United Brotherhood of Carpenters and Joiners of America, Local 18*; *Wood, Wire & Metal Lathers International Union, Local 562*; and *Robertson-Yates Corporation Limited case*, [1972] OLRB REP. 666; 72 CLLC ¶16,064.

30. In *Re Robertson-Yates Corp. Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 18*, *supra*, the board of arbitration entertained a grievance concerning an alleged violation of a provision of a collective agreement relating to the sub-contracting of certain work by the employer. The board of arbitration held that it had jurisdiction to entertain the grievance and stated at pages 92 and 93 of the reported decision as follows:

Whether or not the company is in violation of that article would appear to depend, *inter alia*, on whether the work comes within the 'jurisdiction' of the union or, more precisely whether it is work 'falling under article 15' of the collective agreement. That is an issue in dispute in these proceedings and its determination would appear to call for an interpretation of the provisions of the collective agreement and their application to the material facts. The board is asked, however, to defer such determination until after the decision by the Ontario Labour Relations Board of a matter now before it. That matter is a complaint brought by Northdown Dry Wall and Construction Ltd. under s. 81 of the *Labour Relations Act*, R.S.O. 1970, c. 232, and relating to an alleged jurisdictional dispute, see Board File No. 1411-71-JD. The Board,

which has refused a request for an interim order in the case had, at the time of the hearing of this matter, under advisement, the question whether or not it would exercise jurisdiction in the complaint before it. The parties to the proceedings before the Ontario Labour Relations Board are Northdown Dry Wall and Construction Ltd., complainant and United Brotherhood of Carpenters and Joiners of America, Local 18; the Wood, Wire and Metal Lathers International Union, Local 562; and Robertson-Yates Corporation Limited, as respondents.

If the Ontario Labour Relations Board proceeds to hear and determine the complaint before it on its merits, it is possible that the board would, in its decision, determine that that the work in question ought properly to be assigned to the members of the Lathers Union, so that as between it and the Lathers Union, the Carpenters Union would be prevented from making a proper and valid claim to the work. In the instant case, however, the parties are Robertson-Yates Corp. Ltd., and the Carpenters Union, Local 18. Whatever obligations these parties may be subject to vis-à-vis other parties, the issue before this board is simply whether Robertson-Yates Corp. is in violation of the agreement in effect between it and Local 18 of the Carpenters Union. It will be seen that if the union is successful in this grievance whereas the Lathers Union is awarded the work in issue by the Ontario Labour Relations Board, the employer might be in an unenviable position. That is not, however, the matter for this board which has no jurisdiction with respect to the over-all question of inter-union disputes or of work assignment as between groups of employees. Our jurisdiction is simply to hear and determine grievances arising under the collective agreement before us.

This reported decision is dated June 28, 1972. On the same date the Ontario Labour Relations Board in the *Northdown Drywall & Construction Limited & United Brotherhood of Carpenters and Joiners of America, Local 18; Wood, Wire & Metal Lathers International Union, Local 562; and Robertson-Yates Corporation Limited* case, *supra*, in a decision of the majority, dismissed a request by the complainant Northdown Drywall & Construction Limited for a direction pursuant to section 81(1) of *The Labour Relations Act* and stated:

5. Based on those facts what we have here is really not a dispute about work but a contractual issue that arises because of RyCo's inconsistent contractual arrangements and the complainant is suffering the side effects. We are asked not to sort out which of two unions has the better claim to the work at hand, but to sort out the contractual dilemma by RyCo so that it may proceed to get the work done while at the same time having the benefit of the effects of section 81(1) of *The Labour Relations Act* which has the effect of permitting compliance with a direction of this Board to the extent that such compliance "shall be deemed not to have violated any provision...of any collective agreement". We are thus asked to bail out RyCo and give some order to a situation that has been brought about by a flagrant disregard of contractual commitments and moreover to do so in a manner that may absolve or shield the parties from their abuses.

6. We decline to do so. We recognize that this Board has an obligation to maintain industrial peace. We recognize further that there is an obligation on the industry to assist in maintaining industrial peace by conducting its affairs in an orderly and careful manner so as to avoid the tensions and conflicts that are already rampant in the construction industry. There must be some form of self-help or policing by the industry. This Board is not to be viewed as a panacea for the ills of the construction industry. We do not sit as Solomon ever ready to divide the baby. We expect that the parties will exercise some self-restraint in their affairs and not expect this Board to be a forum which absolves them from their excesses.

7. We are not prepared to make an order in the facts of this case. Under section 81(1) we are given the power to direct what action, if any, the parties shall do or refrain from doing and assuming the facts as put forth by the parties this is a case where we would not be prepared to make any direction, and on that basis alone we are not prepared to proceed with the application.

The majority then went on to determine that on the evidence before it the Board did not have jurisdiction to entertain the complaint under section 81(1). In so far as the majority determined that the Board did not have jurisdiction, the preceding excerpt from the decision may be regarded as *obiter dicta*. This decision together with the *Acme Lathing Co. Ltd.* case, [1972] OLRB REP. 215, and the *Abe Dick Masonry Limited* case, [1972] OLRB REP. 74, were referred to by counsel for Local 95 as the far end of the spectrum in a series of decisions by this Board which indicated a negative position towards the interrelationship of the parties and the precipitation of jurisdictional disputes.

31. The quotation from the decision of the Board in the preceding paragraph in *Northdown Drywall & Construction Limited & United Brotherhood of Carpenters and Joiners of America, Local 18; Wood, Wire & Metal Lathers International Union, Local 562; and Robertson-Yates Corporation Limited* case, *supra*, may, as we have stated, be regarded as *obiter dicta* and does not represent the thinking of this division of the Board. The assertion by trade unions of what is their self-proclaimed jurisdiction over work to be performed leads to jurisdictional disputes. The Board does not agree that the conduct of Robertson-Yates Corporation Limited ("Ryco") was the proper point of entry into the latter's contractual arrangements. Frequently, employers are the hapless victims of jurisdictional disputes. In our view an analysis of Ryco's position ought to start with a recognition that a jurisdictional claim by a trade union gave rise to a contractual dilemma. It is easy but unrealistic to criticize Ryco for entering into a collective agreement which contained a clause respecting a trade union's jurisdiction to perform certain work. The Board agrees with the views expressed by the board of arbitration in *Re Comstock International Ltd. and International Union of Operating Engineers, Local 793, supra*, at p. 317:

Although the union takes the position that the company only has itself to blame for the position in which it now finds itself, in view of the fact that it entered into two conflicting collective agreements with unions which have overlapping jurisdictions, this position fails to give effect to the fact that unions are very jealous about their jurisdictions

and will not willingly enter into collective agreements which in any way abridge their constitutional jurisdiction. However, such an attempt to shift responsibility to the company also fails to recognize that it was the unions themselves which initially created the problems which give rise to jurisdictional disputes. Union constitutions predate the collective agreements which are subsequently entered into. The fact that one craft union has a constitutional claim for work which is also covered by another craft union's constitution is a prime cause for jurisdictional disputes. The inability of craft unions to agree with one another concerning their respective jurisdictional limits caused these unions to expend almost as much effort asserting and protecting their work jurisdiction against each other as they do to advance the other interests of their members as against employers. It is readily apparent that there is no easy solution to this problem.

32. In our view, the function of the Board in jurisdictional disputes is to determine if it has jurisdiction to entertain a complaint. Where the Board determines that it has jurisdiction, it should entertain the complaint on its merits. The Board prefers not to regard its position as being either positive or negative. Where two or more trade unions and one or more employers are engaged in a jurisdictional dispute, it does not advance a solution of a jurisdictional dispute by blaming any party for its apparent duplicity. Attempts by craft trade unions in the construction industry to resolve their jurisdictional disputes within the framework and under the auspices of their own organizations have not been successful. Attempts at forms of self-help or policing in the industry have been unsuccessful. This Board is the only forum where all of the interested parties to a jurisdictional dispute – trade unions and employers – may appear as parties. While the Board does not regard itself as a panacea for the ills of the construction industry, it is prepared to consider all aspects of a jurisdictional dispute on as broad a base as possible in the belief that regardless of whoever has precipitated a jurisdictional dispute the only way to settle such a dispute is by a determination of this Board after hearing from all of the interested parties.

33. The approach of the board of arbitration in *Re Robertson-Yates Corp. Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 18, supra*, stresses the consensual aspects of jurisdictional claims to work and is essentially a two dimensional view of arbitration in the context of jurisdictional disputes. Such an approach no doubt serves the purposes of arbitration in the realm of collective bargaining in the industrial sector. However, the approach of this Board is three dimensional in that it first of all determines the merits of a jurisdictional dispute in a complaint under section 81 of The Labour Relations Act before considering a grievance under a collective agreement under section 112a of The Labour Relations Act. The nature of the construction industry with its craft trade unions, conflicting jurisdictional claims, the sequence of work to be performed on a project and the contractual arrangements between employers requires such a three dimensional approach. The two dimensional view reveals only an untypical cross-section of a situation in industrial relations in the construction industry whereas the three dimensional view permits the two dimensional view to be considered as a part of the entire scenario of such industrial relations. This Board possesses far wider remedial powers than a board of arbitration in that, this Board may, in determining a jurisdictional dispute after hearing from all of the interested parties, alter bargaining units defined in a certificate or a collective agreement. Reference is made to section 81(15), (16), (17) and (18). In our view this Board's approach to jurisdictional disputes is more in accordance with the realities of the construction industry.

34. In the Board's experience nothing has a greater disruptive effect on amicable relations between the craft trade unions and the employers in the construction industry than jurisdictional disputes over which craft is to perform certain work. These craft trade unions each lay claim to wide areas of work. While there is seldom a dispute over most of the work which each craft trade union claims, there are peripheral areas where disputes arise between two or more craft trade unions. The introduction of new methods of construction, prefabrication of units and systems, the introduction of entirely new materials and the substitution of new materials for old materials accentuate claims for work and cause jurisdictional claims in constitutions to be recast. On many occasions such jurisdictional claims are included in collective agreements. Craft unions such as the United Brotherhood of Carpenters and Joiners of America, for example, where they succeed in incorporating jurisdictional clauses in collective agreements with general or prime contractors, enjoy an advantage in protecting the work jurisdiction which they claim.

35. The two dimensional approach means that a craft trade union which is in a position to include a provision in a collective agreement whereby the general or prime contractor agrees to engage only sub-contractors who are under agreement with that craft trade union to perform work within its jurisdiction is also in a position to effectively limit the amount of work which is available to craft trade unions such as for example, Local 562 of the Wood, Wire and Metal Lathers' International Union which are normally parties to collective agreements with employers who are traditionally sub-contractors. See, for example, *Re Ellis-Don Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, *supra*, and the *Northdown Drywall & Construction Limited and Ellis-Don Limited* case, Board File 2279-72-U, unreported decision dated June 28, 1972. To the extent that Local 537 may be a party to a collective agreement with McKee; it may, in the circumstances of this complaint, be in an analogous position to the United Brotherhood of Carpenters and Joiners of America.

36. For the foregoing reasons the Board not only finds that it has jurisdiction to entertain this complaint under section 81 of the Act but also finds that entertaining this complaint prior to a determination of any proceeding before a board of arbitration is a more appropriate way of proceeding than awaiting the possible determination of a board of arbitration.

37. The Board now considers the second preliminary matter. Local 537 alleges that Eaman has already made a jurisdictional dispute complaint claim with the Impartial Jurisdictional Disputes Board in Washington by date of July 5, 1977, asking it to make a decision on the same work between the same two unions involving the same job.

38. In a letter dated April 6, 1977, McKee rejected a grievance by Local 537 which alleged a violation of section 10 of the international agreement between the Sheet Metal Workers' International Association and Arthur G. McKee & Company. In this letter McKee stated:

Having stated our understanding of the terms of reference our reply to your letter is as follows:

a) Section 10 requires that our subcontractors comply with conditions of employment contained therein and if we had in our employ any sub-

contractor working under these terms we would most certainly insist that the provisions outlined in Section 10 be strictly applied.

b) Our approach is that the matter in hand is purely and simply a jurisdictional dispute which should be pursued under Section 12 of the same International Agreement.

i.e. All jurisdictional disputes shall be settled pursuant to the rules and procedures of the National Joint Board for the settlement of Jurisdictional Disputes in the Building and Construction Industry.

For these reasons we regret we are unable to entertain or accept that this dispute can become the subject of a grievance and would suggest that you seek redress under Section 12.

Sections 10 and 12 of the international agreement state:

SECTION 10. No Employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project.

SECTION 12. All jurisdictional disputes shall be settled pursuant (sic) to the rules and procedures of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry.

The Board notes that the international agreement has been signed by Mr. J. T. Woods of Cleveland on behalf of Arthur G. McKee & Company and by Edward Carlough, the general president of Sheet Metal Workers' International Association.

39. In a letter dated April 27, 1977, Eaman wrote to the International Association of Heat and Frost Insulators and Asbestos Workers as follows:

Further to your discussions with our superintendent, Mr. W. Hepburn, regarding the above mentioned subject:

Our understanding of the situation is along the same lines as Arthur G. McKee Ltd. in that the sheetmetal workers dispute the assignment of .016" aluminum jacket to the insulators. Further, the sheetmetal workers are seeking a reassignment by taking our client, McKee, to arbitration per Section 10 of the National Agreement.

Our assignment of this work to the insulators was based on past experience where all metal jacketing .016" and less was done by them.

Please contact the writer for any further information which you feel is required to bring this matter to a satisfactory conclusion.

In a letter dated May 5, 1977, the jurisdictional director of the International Association of Heat and Frost Insulators and Asbestos Workers wrote to the chairman of the Impartial Jurisdictional Disputes Board for the Construction industry as follows:

Enclosed are communications from Arthur G. McKee Company, Eaman-Riggs Limited and James Fletcher, Business Manager for Sheet Metal Workers Local 537 with reference to above captioned matter and which you will find self-explanatory.

We respectfully request you notify Arthur G. McKee Company of Canada, Ltd. and President Carlough of the Sheet Metal Workers' International Union that section ten (10) of their national Agreement is in gross violation of the provisions of Article VII, Section 5 of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry which they are signatory to and which reads as follows:

"It shall be a violation of this Agreement for any Local Union, International Union, Employer or Employers' Association to enter into any agreement, resolution, or stipulation that attempts to establish any jurisdiction which deviates from the spirit and intent of the Agreement and Rules and Regulations of the Plan."

The assignment of installing all .016 metals was assigned to the Asbestos Workers by the Contractor, Eaman-Riggs Limited based on area and trade practice. We, therefore, request you also notify the responsible contractors to continue with the disputed work in accordance with their original assignment and direct President Carlough to instruct James Fletcher, Business Manager for his local union 537 to stop harassing the contractors on this project and to process any jurisdictional disputes directly with this International Union or through the established Procedural Rules and Regulations of the Impartial Jurisdictional Disputes Board.

I would appreciate hearing from you pertaining to the above matters at your earliest convenience.

40. In letters to McKee, Eaman and Edward Carlough dated May 9, 1977, the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry stated:

Gentlemen:

The enclosed letter dated May 5, 1977, with enclosures, has been received from President Haas regarding a jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over installing all .016 metals, Texaco Refinery project, Nanticoke On-

tario Canada, Arthur G. McKee Company of Canada Ltd. contractor, Eaman-Riggs Ltd subcontractor.

President Carlough is requested to instruct the local union to cease interference with work and proceed in accordance with contractor's assignment and to adjust any continuing jurisdictional dispute directly or process any work assignment complaint in accordance with Procedural Rules of the Board. The grievance filed against McKee involves a jurisdictional dispute and constitutes a violation of Article VII, Sec. 5.

Pending direct adjustment of this jurisdictional dispute by the International Unions involved or decision by the Board, *contractor is directed to proceed with disputed work in accordance with his original assignment.* A change of contractor as demanded by local Sheet Metal Workers will not alter the original assignment made to asbestos workers by Eaman-Riggs Ltd.

A copy of this letter was sent to Mr. Haas, the president of the International Association of Heat and Frost Insulators and Asbestos Workers.

41. On May 27, 1977, Eaman wrote to the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry as follows:

SUBJECT: Metal Jacketing .016" Texaco Refinery, Nanticoke
Project, Ontario, Canada.
Reference – Your letter dated May 9, 1977.

We have been informed by our client Arthur G. McKee Company Limited, that the grievance against them by the Sheet Metal Workers Local 537 has not been withdrawn.

This continued harassment of our client is effecting our chances of extending our subcontract, as well as impeding the present progress of the job.

We cannot effectively continue with the work at hand, unless the interference ceases immediately, and the Sheet Metal Union representative on site is informed that Eaman-Riggs Limited has been directed to proceed in accordance with the original assignment, pending an adjustment by the International Unions or the Board.

We ask your assistance in resolving this matter at the earliest possible time, so that we may proceed with our work without interference, and assure our client that there will be no further disruptions.

The Chairman responded in a letter dated May 31, 1977, to Mr. Carlough and Eaman with copies to Mr. Haas and McKee and stated:

Gentlemen:

With further reference to our file CAN 5/9/77 the enclosed letter dated May 27, 1977 has been received from Eaman-Riggs Limited regarding the jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over installing all .016 metals, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G. McKee Company of Canada Ltd. contractor, Eaman-Riggs Ltd. subcontractor.

President Carlough is requested to instruct the local union to cease interference with work and proceed in accordance with contractor's assignment and to adjust any continuing jurisdictional dispute directly or process any work assignment complaint in accordance with Procedural Rules of the Board.

Pending direct adjustment of this jurisdictional dispute by the International Unions involved or decision by the Board, *contractor is directed to proceed with disputed work in accordance with his original assignment.*

42. On June 10, 1977, Eaman once again wrote to the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry and stated:

REFERENCE: CAN 5/9/77

Confirming our phone conversation of June 9, 1977, the grievance against our client, Arthur G. McKee, by the Sheet Metal Workers Local 537, has not been dropped.

In order to avoid disruptions in our work and maintain our contract with our client, we may be forced to apply to the Ontario Labour Relations Board, under Section 81, for a settlement of the dispute.

Again, we ask your assistance in resolving this matter in order to avoid this course of action.

Enclosed, please find the correspondence pertinent to this subject.

The chairman responded in a letter to Mr. Carlough dated June 14, 1977, and stated:

The enclosed correspondence dated June 10, 1977 has been received from Eaman-Riggs Limited regarding our file CAN 5/9/77 in the jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over installing all .016 metals, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G. McKee Company of Canada Ltd contractor, Eaman-Riggs Ltd. subcontractor.

This is a jurisdictional dispute, pure and simple, and the action of your local union constitutes a violation of the Plan Article VII, Sec. 5. You

are requested to advise your local union to drop this grievance and follow the Procedural Rules and Regulations of the Impartial Jurisdictional Disputes Board.

A change of subcontractor would not change the assignment made by Eaman-Riggs Ltd. as far as the Board is concerned.

Copies of this letter were sent to Mr. Haas, McKee and Eaman.

43. By the month of July, 1977, the pattern of correspondence was well established. Yet again, on July 5, 1977, Eaman wrote to the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry and stated:

REFERENCE: CAN 5/9/77

SUBJECT: Metal Jacketing .016"
Texaco Refinery Project
Nanticoke, Ontario.

The disruption in work on the above project due to the Sheet Metal Worker's claim of .016" jacketing over insulation, is continuing with threats of strike and picketing.

As we have indicated before the assignment of work was made to the insulators based on past and present experience, both in this area and all other areas that we have done jobs.

Two of our recent major projects with the same work assignment included a plant expansion at Millhaven Fibers in Kingston, Ontario, completed early 1977, and a new chemical plant for Union Carbide in Sarnia, which is presently under construction. A complete listing of projects would be too lengthy to compile in a letter.

There has been no challenge of assignment on any of these projects.

The efficiency and continuity of a project would be seriously hampered if two trades were involved, due to lost time waiting on each other and excessive reassignment of work areas.

Also, it is imperative that the application of jacketing over fittings and valves be done by workers familiar with insulation in order to assure proper fit and complete weather protection, and re-work the insulation if necessary.

We respectfully request that the Board render a decision at your next meeting and put an end to the disruption of this project.

Once again the chairman responded with letter to Messrs. Haas and Carlough dated July 11, 1977, wherein he stated:

Gentlemen:

Enclosed is a copy of a letter dated July 5, 1977 from Eaman-Riggs Limited requesting a job decision in a jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over installing all .016" metals, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G. McKee Company of Canada Ltd contractor Eaman-Riggs Ltd subcontractor.

Both International Unions are requested to adjust this jurisdictional dispute directly.

In the event it is not adjusted directly and this office so notified, it will be scheduled for consideration by the Impartial Jurisdictional Disputes Board at its meeting of July 21, 1977. May I have your position with regard to the work in dispute by July 20, 1977.

Copies of this letter were sent to Eaman and McKee.

44. On July 11, 1977, the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry wrote a letter to McKee and Eaman and stated:

Gentlemen:

This will acknowledge receipt of Eaman-Riggs Ltd. request for a job decision in the jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers over installing all .016 metals, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G McKee Company of Canada Ltd. contractor, Eaman-Riggs Ltd. subcontractor.

Pending direct adjustment of this jurisdictional dispute by the International Unions involved or a decision by the Impartial Jurisdictional Disputes Board, the contractor responsible for performance of the disputed work is directed to proceed with this work in accordance with the original assignment.

In the event that this jurisdictional dispute is not adjusted directly and this office so notified, it will be scheduled for consideration by the Board at its meeting of July 21, 1977. In this case, please send a full and complete description of the work in dispute, including if possible pictures and prints, to this office by July 20, 1977.

If the dispute is adjusted directly, please notify this office immediately by wire.

Copies of this letter were sent to Messrs Haas and Carlough. In addition, the chairman in a letter dated July 11, 1977, to Mr. Carlough and Eaman stated:

Gentlemen:

With further reference to our file CAN 5/9/77, the enclosed letter dated July 5, 1977 has been recieved from Eaman-Riggs Ltd. regarding a jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over installing all .016 metals, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G McKee Company of Canada Ltd. contractor, Eaman-Riggs Ltd. subcontractor.

President Carlough is requested to instruct the local union to cease threats of work stoppage and picketing and proceed with work in accordance with contractor's assignment and to adjust any continuing jurisdictional dispute directly or process any work assignment complaint in accordance with Procedural Rules of the Board.

Pending direct adjustment of this jurisdictional dispute by the International Union involved or decision by the Board, *contractor is directed to proceed with disputed work in accordance with his original assignment.* As requested, we will schedule this matter for a job decision by the Board on July 21, 1977.

Copies of this letter were sent to Mr. Haas and McKee.

45. As the date for the deliberation of the Impartial Jurisdictional Disputes Board for the Construction Industry drew near, the chairman wrote the following letter which was dated July 17, 1977, to Mr. Carlough:

With further reference to our file CAN 5/9/77, President Haas has also requested a job decision in the jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over the handling, cutting, fitting and installation of all metal lagging .016 and lighter and fabrication and installation of all metal gores and fitting covers such as valves, elbows, tees, etc., Texaco Refinery project, Nanticoke Ontario Canada, Arthur G McKee Company of Canada Ltd. contractor, Eaman-Riggs Ltd. subcontractor.

This jurisdictional dispute will be considered by the Impartial Jurisdictional Disputes Board at its meeting of July 21, 1977. May I have your position with regard to the work in dispute by July 20, 1977.

Copies of this letter were sent to Mr. Haas, Eaman and McKee. On the same date Mr. Fletcher, the business manager of Local 537, received the following telegram:

FOLLOWING COMMUNICATION RECEIVED: QUOTE

WITH FURTHER REFERENCE TO OUR FILE CAN 5/9/77, THE ENCLOSED LETTER DATED JULY 5, 1977 HAS BEEN RECEIVED FROM EAMAN-RIGGS LTD REGARDING A JURISDICTIONAL DISPUTE BETWEEN THE INTERNATIONAL AS-

SOC. OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS AND THE SHEET METAL WORKERS INTERNATIONAL ASSOC OVER INSTALLING ALL .016 METALS, TEXACO REFINERY PROJECT, NANTICOKE ONTARIO CANADA, ARTHUR G MCKEE COMPANY OF CANADA LTD CONTRACTOR, EAMAN-RIGGS LTD SUBCONTRACTOR.

PRESIDENT CARLOUGH IS REQUESTED TO INSTRUCT THE LOCAL UNION TO CEASE THREATS OF WORK STOPPAGE AND PICKETING AND PROCEED WITH WORK IN ACCORDANCE WITH CONTRACTOR'S ASSIGNMENT AND TO ADJUST ANY CONTINUING JURISDICTIONAL DISPUTE DIRECTLY OR PROCESS ANY WORK ASSIGNMENT COMPLAINT IN ACCORDANCE WITH PROCEDURAL RULES OF THE BOARD.

PENDING DIRECT ADJUSTMENT OF THIS JURISDICTIONAL DISPUTE BY THE INTERNATIONAL UNIONS INVOLVED OR DECISION BY THE BOARD. CONTRACTOR IS DIRECTED TO PROCEED WITH DISPUTED WORK IN ACCORDANCE WITH HIS ORIGINAL ASSIGNMENT, AS REQUESTED, WE WILL SCHEDULE THIS MATTER FOR A JOB DECISION BY THE BOARD ON JULY 21, 1977. (SIGNED) FRED J. DRISCOLL, JR., CHAIRMAN IMPARTIAL JURISDICTIONAL DISPUTE BOARD UNQUOTE FORWARD AT ONCE TO THIS DEPARTMENT ALL MATERIAL PERTINENT TO THIS DISPUTE, PRINTS, PICTURES, SPECIFICATIONS, ETC. AND CURRENT STATUS OF JOB.

LEON RAZEE, INTL REP JURIS DEPT
SHEET METAL WORKERS INTL

46. In a letter dated July 22, 1977 the Chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry advised Messrs. Carlough and Haas, McKee and Eaman of the decision of that board. The letter states:

Gentlemen:

At its meeting July 21, 1977 the Impartial Jurisdictional Disputes Board considered the jurisdictional dispute between the International Association of Heat and Frost Insulators and Asbestos Workers and the Sheet Metal Workers International Association over the handling, cutting, fitting and installation of all metal lagging .016 and lighter and fabrication and installation of all metal gores and fitting covers such as valves, elbows, tees, Texaco Refinery project, Nanticoke Ontario Canada, Arthur G McKee Company of Canada Ltd contractor, Eaman-Riggs subcontractor.

The Board found the work in dispute to be the installation of .016 lag-

ging, metal gores and fitting covers, some of which is over .016 but incidental to the work to which covers are being installed and voted that there is no basis to change the contractor's assignment.

This action of the Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

47. In response to the telegram Mr. Fletcher advised the Sheet Metal Workers' International Association that he did not have prints and plans in his possession. However, Mr. Fletcher did advise that prints and plans were in the possession of McKee and Eaman.

48. Local 537 argued that the letter dated May 5, 1977, from the International Association of Heat and Frost Insulators and Asbestos Workers represented a request that the assignment of work be processed as a work assignment dispute. Local 537 referred to the correspondence which has been set forth above and argued that all possible parties to this complaint were before the Impartial Jurisdictional Disputes Board for the Construction Industry. It was emphasized that a decision was made on exactly the same work which is the subject matter of this complaint and that both Eaman and the International Association of Heat and Frost Insulators and Asbestos Workers had requested the Board to make the decision which it made on July 21, 1977. Local 537 pointed out that members of Local 95 had as a result of that decision, continued to perform the work which has been assigned to them without any physical interference by Local 537.

49. Local 537 also referred to sections 81(13), (14) of The Labour Relations Act. These subsections read as follows:

(13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from the assignment of work, the Board may, upon such terms and conditions as it may fix, postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

50. Local 537 pointed out that there was no evidence that the decision of the Impartial Jurisdictional Disputes Board for the Construction Industry was being thwarted and argued that there was evidence of a consensus before that board in that no one objected to that board's jurisdiction. Local 537 reasoned that, in these circumstances, the parties to this complaint had made an arrangement to resolve their differences which resulted from an as-

signment of work as contemplated by section 81(13) and that the Board, in the exercise of its discretion, should not inquire into this complaint.

51. The mandatory aspects of section 81(14) were stressed by Local 537. It pointed out that under section 12 of the international agreement the Sheet Metal Workers' International Association and Arthur G. McKee & Company had agreed that all jurisdictional disputes should be settled pursuant to the rules and procedures of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry (the predecessor of the Impartial Jurisdiction Disputes Board for the Construction Industry). Local 537 agreed that while the collective agreement which is binding on Eaman and Local 95 does not contain a similar provision Local 95 had by inference referred the dispute over the assignment of work to the Impartial Jurisdiction Disputes Board for the Construction Industry.

52. Local 537 also argued that quite apart from the provisions of section 81(13) and 81(14) the Board has a discretion with regard to entertaining this complaint and relied on the *Omega Marble Company Limited* case [1970] OLRB REP. May, p. 231, and characterized that decision as an example where a complainant had attempted to use this Board by way of an appeal. While Local 537 conceded that the facts in the *Omega Marble Company Limited* case, *supra*, are not identical to the facts of the instant complaint, it argued that the situation is quite similar apart from the motives which were involved.

53. Eaman argued that there was no evidence of any arrangement under section 81(13) and 81(14) and relied on the decision of this Board in the *Adam Clark Company Ltd.* case, 76 CLLC ¶ 16,053. The *Omega Marble Company Ltd.* case, *supra*, was distinguished and it was argued that there had to be some reason for the Board not to entertain this complaint. Eaman pointed to an apparent conflict between certain of the provisions of The Labour Relations Act and *The Apprenticeship and Tradesmen's Qualification Act* and the need for a decision of record.

54. McKee argued that counsel for Local 537 would have the Board believe that there has been a four way application to the Impartial Jurisdiction Disputes Board for the Construction Industry and that because some of the parties are not unhappy they wish to proceed before this Board. McKee disagreed with the view which it attributed to counsel for Local 537 and stressed that this complaint was triggered by the conduct of Local 537 and refuted any argument that it could file a complaint with this Board while Eaman and Local 95 were precluded from so doing. Reference was made to the *Ellis-Don Limited* case, [1972] OLRB Rep. 215. McKee also referred to the characterization by the Impartial Jurisdiction Disputes Board for the Construction Industry of the dispute before it as "This is a jurisdictional dispute, pure and simple...". It was argued that even if it could be said that Eaman had applied to the Impartial Jurisdiction Disputes Board for the Construction Industry there was no allegation in the pleading that Local 95 had made a similar application.

55. McKee pointed out that there was no evidence that all of the interested parties had either attended before the Impartial Jurisdiction Disputes Board for the Construction Industry or made representation to it. It was argued that since the grievance by Local 537 had not been withdrawn Local 537 could not maintain that the decision of the Impartial Jurisdiction Disputes Board for the Construction Industry is working satisfactorily. McKee further argued that Local 537 was not complying with the decision of the Impartial Jurisdic-

tional Disputes Board for the Construction Industry because it had called the Ministry of Colleges and Universities into the dispute and that this Board should exercise its paramount powers to resolve this dispute over the assignment of work.

56. McKee also argued that this is not an instance of all the parties having agreed to be bound by the decision of the Impartial Jurisdictional Disputes Board for the Construction Industry and that its decision had not been effective in resolving the dispute over the assignment of work. The argument concluded with the observation that the parties are entitled to obtain a decision which is enforceable in Ontario.

57. Local 95 argued that the decision in the *Omega Marble Company Ltd.* case, *supra*, was the only exception to the line of decisions of this Board which established the principle that where the Board has jurisdiction under section 81(1) it will entertain a request for a direction unless the factual situation falls within the ambit of either section 81(13) or 81(14). Local 95 argued that the pre-conditions referred to in section 81(14) do not exist and that the Impartial Jurisdictional Disputes Board for the Construction Industry had not been mutually selected by the parties. It was pointed out that the collective agreement which is binding on Eaman and Local 95 does not contain any provision for the resolution of jurisdictional disputes. It was argued that Local 537 does not appear to have a collective agreement with McKee. Local 95 reasoned that since the pre-conditions referred to in section 81(14) do not exist then the Board is not prevented from exercising its jurisdiction and referred to the *Adam Clark Company Limited* case, *supra*, and to the *Foundation Company of Canada Limited* case, [1969] OLRB REP. February, p. 1219.

58. Local 95 characterized the dismissal of the complaint in the *Omega Marble Company Ltd.* case, *supra*, as an exercise of its discretion pursuant to section 81(1) rather than as a finding of a lack of jurisdiction under section 81(14) or the exercise of the Board's discretion under section 81(13). It was argued that section 81(13) could not have been a basis of the decision in the *Omega Marble Company Ltd.* case, *supra*, because that subsection refers to a discretionary power in the Board to postpone an inquiry with a complaint and does not give the Board the power to dismiss a complaint. It was emphasized that the respective international trade unions of Local 537 and Local 95 made certain filings before the Impartial Jurisdictional Disputes Board for the Construction Industry and that there was no evidence regarding any representation from either Eaman, or Local 537 or Local 95. It was stressed that the parties did not have a decision which is enforceable in Ontario and that Local 95 wanted such a decision.

59. Local 95 pointed out that Local 537 had not withdrawn its grievance against McKee and had ignored the direction of the Impartial Jurisdictional Disputes Board for Construction Industry to this effect. It was argued that under these circumstances the remedial order of that board was ineffective and that Local 537 had declined to have that board's remedial order filed as a settlement in the office of the Registrar of the Supreme Court of Ontario pursuant to section 81(6). Local 95 referred to the practice of the Impartial Jurisdictional Disputes Board for the Construction Industry of not having *viva voce* hearings and argued that it was entitled to a hearing before this Board in an endeavour to have an enforceable direction of this Board. It was pointed out that the letter from the Industrial Training Branch of the Ministry of Colleges and Universities dated June 23, 1977, stated that the decision therein might be changed as a result of a ruling handed down by a Board dealing with jurisdictional disputes. In the view of Local 95 this constituted another reason for the

Board to exercise its discretion under section 81(13) and decline to postpone inquiring into this dispute arising from the assignment of work. Local 95 was critical of the decision of the Industrial Training Branch and characterized it as an encroachment on the jurisdiction of this Board in that the Branch had purported to make an assignment of work which was also made without a hearing.

60. Local 95 further pointed out that a decision of the Impartial Jurisdictional Disputes Board for the Construction Industry is only efficacious when all of the parties are in agreement to follow the decision. Local 95 stated that neither the National Labour Relations Board nor this Board have followed the decisions of either the Impartial Jurisdictional Disputes Board for the Construction Industry or its predecessor the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry and referred to the *Hydro-Electric Power Commission of Ontario* case [1969], OLRB REP. November, p. 1015.

61. In reply Local 537 argued that Local 95 was not entitled to a direction which is enforceable in Ontario and characterized the conduct of Local 95, Eaman and McKee as an attempt to nullify a grievance and to prevent Mr. Fletcher from complaining to the Ministry of Colleges and Universities about the performance of work by persons who are not members of a certified trade. Local 537 further argued that the Board should not enforce a decision of the Impartial Jurisdictional Disputes Board for the Construction Industry and that it was complying with the decision of that board. This Board was urged to view the conduct before the Impartial Jurisdictional Disputes Board for the Construction Industry as an "arrangement" within the meaning of section 81(13). It was pointed out that this Board characterized the conduct of the parties in the *Omega Marble Company Ltd.* case, *supra*, as an "arrangement" and that the Board should postpone inquiring into the instant complaint on a *sine die* basis.

62. The Board will initially consider the arguments with respect to section 81(14). The Board is prohibited from inquiring into a complaint made by a trade union, council of trade unions, employer or employers' organization, that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement. There are two documents which are in evidence before the Board and which are relied upon as being collective agreements. There appears to be no dispute that Eaman and Local 95 are bound by a collective agreement between Local 95 and The Master Insulators' Association of Ontario, Incorporated which is effective from July 7, 1975, until April 30, 1979. In addition there is an international construction agreement between Sheet Metal Workers' International Association and Arthur G. McKee & Company which was entered into on September 30, 1969. Local 95 disputes that this is a collective agreement with respect to Local 537 and McKee. The Board has not heard argument on the status of the international construction agreement as a collective agreement with respect to Local 537 and McKee. In these circumstances, the Board will assume for the purpose of argument, without actually deciding, that the international construction agreement is a collective agreement between Local 537 and McKee.

63. The international construction agreement does provide in section 12 for the settlement of jurisdictional disputes pursuant to the rules and procedures of the National Joint

Board for the settlement of Jurisdictional Disputes in the Building and Construction Industry. The collective agreement between Local 95 and The Master Insulators' Association of Ontario Incorporated, does not contain an identical or even similar provision. In these circumstances, may it be said that the Board does not have jurisdiction to entertain this complaint by virtue of section 81(14)? In the *Adam Clark Company Limited* case, *supra*, the Board considered its jurisdiction with respect to section 81(14). The respective arguments of the two trade unions in that case are similar to the positions of Local 537 and Local 95 in the instant complaint.

64. In the *Adam Clark Company Limited* case, *supra*, the Board reasoned that there are at least three parties to a jurisdictional dispute and interpreted the provisions of section 81(14). The Board concluded at pp. 701-702 as follows:

24. Section 81(14) refers to "trade union" and "collective agreement" in the singular. Given the proposition that jurisdictional disputes are at least tripartite in nature, section 81(14) if narrowly interpreted, would apply only in those instances where an employer or employer's organization is a party to one collective agreement with either a council of trade unions or a certified council of trade unions. Reference is made to section 1(1)(n) of The Labour Relations Act. If this interpretation were to prevail the application of section 81(14) would be extremely limited and ought not to have been referred to in the decisions mentioned in paragraphs 19 to 22. The Board notes that in the cases which concerned paper mills and where there was only one collective agreement, the trade unions therein were apparently not associated as either a council of trade unions or as a certified council of trade unions.

25. In our view, section 81(14) is not to be narrowly interpreted. Section 81(14) is to be interpreted so as to give effect to the option of employers and trade unions to make private arrangements for the settlement of jurisdictional disputes. Such an interpretation is, in our view, desirable and permissible by the application of section 27(j) of *The Interpretation Act*, R.S.O. 1970, c. 225. Section 27(j) provides:

"27. In every Act, unless the contrary intention appears,

(f) words imparting the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse";

26. In our opinion a contrary intention does not appear in section 81(14). In order to have any application to the realities of jurisdictional disputes the words "trade union" and "collective agreement" are to be interpreted to include "trade unions" and "collective agreements" respectively. In the *Fraser-Brace Engineering Company Limited* case, *supra*, the Board considered a complaint and an objection to its jurisdiction under section 66(8) [section 81(14)]. In reviewing the arguments, the Board considered the situation where the complaining employer was a party to two separate collective agreements with two trade un-

ions. In that case the Board clearly adopted the premise that the words "trade union" and "collective agreement" in section 66(8) [section 81(14)] included "trade unions" and "collective agreements" respectively.

27. Section 81(14) is, in our opinion, open to two interpretations where "trade union" and "collective agreement" may be considered in the singular or in the plural. Since the language of section 81(14) is reasonably capable of two constructions a choice may be made. As was stated by Finnemore, J. in *Holmes v. Bradfield* [1949] 2 K.B. 1,7:

"It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to be, none of those things."

28. The object of section 81(14) is also relevant. Section 81 provides a forum for the settlement of jurisdictional disputes and section 81(14) creates an exception to the jurisdiction of the Board where the parties have made private arrangements for the settlement of jurisdictional disputes. The Board in constructing the words "trade union" and "collective agreement" in section 81(14) to include "trade unions" and "collective agreements" adopts the reasoning of Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Limited* [1940] A.C. 1014, 1022, where he stated:

...if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we would avoid a construction which would reduce the legislation to futility based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

29. The Board now considers the instant case which in our view, is similar to the *Fraser-Brace Engineering Company Limited* case, *supra*. Local 793 has a collective agreement with the complainant which contains a provision of the type referred to in section 81(14). Local 46, has a collective agreement with the complainant which does not contain a provision of the type referred to in section 81(14). The instant case is to a degree similar to the *Fraser Brace Engineering Company Limited* case, *supra*, in that where an employer and two trade unions provide in two collective agreements for different methods of resolving a dispute there can no more be a resolution of any difference among or between them arising out of work assignment than there can be in the instant case where one collective agreement contains a provision of the type referred to in section 81(14) and one collective agreement does not contain such a provision. For the foregoing reasons the Board finds that the difference as to work assignment cannot be resolved under the collective agreement or collective agreements within the meaning of section 81(14) of The Labour Relations Act.

The reasoning set forth above is, of course applicable in the instant complaint. Having regard to the contents two documents which are relied upon as collective agreements, the Board finds that the difference as to work assignment cannot be resolved under either of these two documents within the meaning of section 81(14). Accordingly, the Board is not prohibited by the provisions of section 81(14) from inquiring into this complaint.

65. Under section 81(13) the Board has a discretion with regard to whether it should postpone inquiring into a complaint under section 81 until the difference has been dealt with in accordance with an arrangement of the type referred to in section 81(13). The first question to answer is whether the parties have made an arrangement within the meaning of section 81(13). The proceedings before the Impartial Jurisdictional Disputes Board for the Construction Industry were initiated by the International Association of Heat and Frost Insulators and Asbestos Workers in its letter dated May 5, 1977. In a letter dated May 5, 1977, the chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry requested Mr. Carlough to instruct Local 537 to cease interference with work and proceed in accordance with Eaman's assignment and to adjust any continuing jurisdictional dispute in accordance with the procedural rules of that board. In a letter dated May 27, 1977, Eaman again sought the assistance of the Impartial Jurisdictional Disputes Board for the Construction Industry and in a letter dated May 31, 1977, its chairman repeated the requests he made in his letter dated May 5, 1977. Further written requests for assistance were made by Eaman to that board during June and July of 1977 and similar responses were given by the Chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry. However, the Board notes that there was nothing before it which indicated threats of a strike or picketing. On July 21, 1977, the Impartial Jurisdictional Disputes Board for the Construction Industry rendered its decision which confirmed the original assignment of Eaman.

66. The chairman of the Impartial Jurisdictional Disputes Board for the Construction Industry in his correspondence clearly regarded the conduct of Local 537 as a violation of the plan to settle the differences of the parties over the assignment of work. As late as June 28, 1977, Mr. Fletcher requested the assignment of work from Eaman. There was no evidence that this request has been withdrawn. It appears to the Board that the differences over the assignment of work is very much still in existence.

67. On the evidence before it the Board is not satisfied that all of the parties have made an arrangement within the meaning of section 81(13). In particular there is nothing before the Board which indicate that both Local 95 and Local 537, as opposed to their respective international trade unions, are parties to the alleged arrangement. The Board has generally drawn a distinction between a local trade union and its international trade union, see, for example, the *American-Standard Products (Canada) Limited* case, [1965] OLRB REP. February, p. 590. While the alleged arrangement appeared to have contemplated that Local 95, Local 537, Eaman and McKee would all be involved, the evidence before the Board does not establish that this was achieved.

68. The decision of the Board in the *Omega Marble Company Ltd.* case, *supra*, was relied upon by Local 537 in its argument with respect to section 81(13). A consideration of that decision, however, reveals that the Board dismissed the complaint pursuant to section 66(1) and did not postpone inquiring into the complaint pursuant to section 66(7) [these subsections are substantially the same as the present subsection 81(1) and 81(13)]. The deci-

sion in the *Omega Marble Company Ltd.* case, *supra*, is not an authority for the exercise of the Board's discretion pursuant to section 81(13). Counsel for Local 95 made an interesting analysis of the *Omega Marble Company Ltd.* case, *supra*, in the light of the related decision of a board of arbitration in *Re Operative Plasterers' and Cement Masons' Local 598, and Omega Marble Co. Ltd.* 22 L.A.C. 221, and it may be that the Board will reconsider its reasoning in that decision. It is not necessary, however, to do this in the instant complaint. In the exercise of its discretion pursuant to section 81(13) the Board is not prepared to postpone inquiring into this complaint.

69. In our opinion, the Board's discretion pursuant to section 81(13) should be exercised in those instances where all of the parties who are affected by differences arising from the assignment of work have made an arrangement to resolve such differences. In such circumstances there should be some indication that the parties to the arrangement anticipate some prospect of success in settling the difference arising from the assignment of work. In the absence of such a prospect it is our view that the Board should not postpone inquiring into a complaint.

70. In the course of the arguments which were made with respect to section 81(13) and 81(14) a number of peripheral issues were raised by the parties. Local 537 argued that members of Local 95 had continued to perform the work which has been assigned to them without any physical interference as a result of the decision of the Impartial Jurisdictional Disputes Board for the Construction Industry. In our view, the members of Local 95 performed the work which was assigned to them as a result of Eaman's assignment and not as a result of the decision of that board. Moreover, the fact that work was being performed without physical interference does not settle a dispute arising from the assignment of work. Eaman referred to the need for a decision of record because of an apparent conflict between certain of the provisions of The Labour Relations Act and *The Apprenticeship and Tradesmen's Qualification Act*. The need for a decision of record, in our view, ought to be based upon considerations of authoritatively determining a jurisdictional dispute and not upon a conflict which is perceived in two Acts of the Legislature of Ontario. Where the Board issues a direction under The Labour Relations Act, it is merely exercising its jurisdiction and does not desire to infringe upon the jurisdiction of any other branch of government. McKee referred to the *Ellis-Don Limited* case, *supra*, and argued that because of the decision of the Board in that case it could not have filed a complaint under section 81(1). The Board finds it unnecessary to consider this point because in fact McKee did not file the complaint in this matter. McKee also argued that Local 537 was not complying with the decision of the Impartial Jurisdictional Disputes Board for Construction Industry because it had called the Ministry of Colleges and Universities into this dispute. While it is not necessary for the Board to determine this point, we would be loathe to agree that Local 537 is precluded from approaching a ministry which is charged with enforcing the provisions of another statute lest it be regarded as not complying with a decision of the Impartial Jurisdictional Disputes Board for the Construction Industry.

71. The argument of Local 95 with respect to section 81(6) underscores the fact that the designated jurisdictional representatives, if any, neither unanimously agreed to a settlement of the matter complained of nor was any settlement reduced to writing, signed by the respective representatives and filed with the Board within the time set by section 81(4). In these circumstances section 81(6) has no application to this complaint. The alleged practices and the procedures of the Impartial Jurisdictional Disputes Board for the Construction In-

dustry are not a concern of this Board where the parties to a jurisdictional dispute have agreed to refer their dispute to it in accordance with the provisions of section 8(14). Moreover, as the Board has previously determined, the facts of this complaint do not deprive the Board of jurisdiction pursuant to the provisions of section 81(14). Reference was made to the letter dated June 23, 1977, from the Industrial Training Branch of the Ministry of Colleges and Universities. While the letter indicates that the decision therein might be changed as a result of a ruling handed down by a Board dealing with jurisdictional disputes, the inclusion or exclusion of such a proviso does not constitute a reason in itself for the Board to entertain this complaint. This Board exercises its discretion according to the provisions of The Labour Relations Act and not with reference to causing the Industrial Training Branch to modify any decision it has reached.

72. The remarks of Local 95 about the efficacy of the Impartial Jurisdictional Disputes Board for the Construction Industry raise a number of interesting points. The efficacy of that board depends upon the willingness of trade unions and employers to abide by its decisions. It is seldom possible for any party who proceeds before that board to be sure that the other parties will abide by its decision. For all practical purposes its decisions are not enforceable in Ontario. In this respect the Impartial Jurisdictional Disputes Board for the Construction Industry is not faring any better than its predecessor the ill-starred National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry. On the other hand where this Board has jurisdiction an interim order or direction made under section 81 is filed in the Office of the Registrar of the Supreme Court of Ontario in the prescribed form and is entered in the same way as a judgment or order of that court. Such an interim order or direction is binding on all the parties to the complaint. A fairly clear pattern has emerged in Ontario with respect to the local trade unions which prefer to use the facilities of the Impartial Jurisdictional Disputes Board for the Construction Industry and the local trade unions which prefer to have this Board determine the merits of a jurisdictional dispute. The local trade unions of the United Brotherhood of Carpenters and Joiners of America and Local Union 793 of the International Union of Operating Engineers generally refer their disputes to the Impartial Jurisdictional Disputes Board for the Construction Industry while the local trade unions of the United Brotherhood of Electrical Workers, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Labourers' International Union of North America and Local 562 of the Wood, Wire and Metal Lathers' International Union usually prefer to use the procedures of this Board.

73. Local 95 stated that neither The National Labor Relations Board nor this Board have followed the decisions of either the Impartial Jurisdictional Disputes Board for the Construction Industry or its predecessor. In our view this proposition is too strongly worded. It is true that in *Newton Massachussets District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Porrazzo and Harley Company, Inc.*, 1969 CCH NLRB ¶21,042; 177 NLRB No. 36, for example, the National Labor Relations Board stated that, while it did not imply that a decision of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry might not be a relevant factor, it accorded little weight to the award. The National Labor Relations Board noted that the decision did no more than state that the dispute was governed by one of its own decisions in 1920. The National Labor Relations Board also noted that, in view of the fact that the decision failed to disclose the factors relied upon and the reasoning employed in reaching the ultimate decision, it was unable to evaluate the award in the light of its own stan-

dards to ascertain the degree of significance to be accorded it. In the *Hydro Electric Power Commission of Ontario* case, *supra*, this Board expressed a similar opinion when it stated at page 1024:

28. With reference to the National Joint Board, not only the recent decisions to which we were referred but also in its many earlier decisions on the work in dispute, the Joint Board has almost invariably assigned the stripping of reusable "built-in-place" wall forms to carpenters. We would point out, however, that the Joint Board has not given any reasons to support these assignments other than stating that the work in dispute "is governed by the Memorandum of Understanding of October 3, 1949". This latter document has been essentially discredited as a result of what would appear to be a complete lack of agreement or understanding as to its meaning or interpretation by employers, labourers and carpenters alike going back to its very inception. For these reasons, we find the adjudications of the Joint Board in this matter, at best, of peripheral value.

The members of this division of the Board have yet to see a decision of the Impartial Jurisdictional Disputes Board for the Construction Industry or its predecessor which sets forth the factors which it relied upon in rendering its decision. We would recast the proposition of Local 95 by stating that the Board derives very little assistance from the decisions of the Impartial Jurisdictional Disputes Board for the Construction Industry and its predecessor and that for this reason such decisions have very limited value as precedents. The members of this division of the Board have yet to derive any assistance from a decision of the Impartial Jurisdictional Disputes Board for the Construction Industry or its predecessor.

74. The Board now considers the third preliminary matter. Local 537 submitted that some of this work which is in dispute has been declared to be the work of sheet metal workers under *The Apprenticeship and Tradesman's Qualification Act* as a certified trade and the regulations thereunder. Local 537 alleged that this complaint is being made by the complainant to overcome the decision of the Industrial Training Branch of the Ministry of Colleges and Universities dated June 3, 1977, certifying the work in dispute to be the work of sheet metal workers.

75. Local 537 subpoenaed Bernard Mansell, an enforcement officer with the Ministry of Colleges and Universities. The subpoena required Mr. Mansell "to bring with you and to produce at the time and place aforesaid, all books, documents, papers, letters, copies of letters, and other writings, in your custody, possession or power, containing any entry, memorandum or minutes relating to the matters in issue". Mr. Mansell attended at the hearing of the Board as directed and was examined in chief by counsel for Local 537. No objection was made either by Local 95, McKee or Eaman to the questions which were asked by counsel for Local 537 and Mr. Mansell answered the questions and referred to certain documents which were contained in a file which was in his possession.

76. Counsel for Eaman commenced to cross-examine Mr. Mansell. He asked to examine the documents which were in the file in Mr. Mansell's possession. The witness demurred, expressed the view that his report was privileged and stated that he would have

to consult with his superiors before he could permit anyone to examine the contents of the file which was in his possession. Counsel for Eaman objected to any restriction being placed on his right to cross-examine Mr. Mansell with respect to any of the material which was in his possession. He reasoned that all of the material which Mr. Mansell brought to the hearing in response to the subpoena was relevant to the third preliminary matter and that he was entitled to see the contents of the file and to cross-examine Mr. Mansell with respect to such material. Counsel for Local 95 and McKee supported the argument of counsel for Eaman. At this point the Board concluded the hearing for the day and requested Mr. Mansell to consult his superiors and advise the Board of his position.

77. In a letter to the Board dated October 13, 1977, E. Goodman, Administrator, Training Information and Enforcement, of the Industrial Training Branch of the Ministry of Colleges and Universities stated:

In the capacity of my present position, I am cognisant of the documentation as accrued by Mr. B. Mansell, Enforcement Officer, Industrial Training Branch, Ministry of Colleges and Universities, during the execution of his responsibilities.

On review, it has been determined that the referenced material is within the classification of internal documentation and confidential to the Ministry and cannot be available for public scrutiny.

78. At the continuation of hearing the contents of E. Goodman's letter were discussed by counsel. Counsel for Eaman argued that the letter does not state why the information is privileged and expressed the view that the letter was too easy a way out to avoid a searching cross-examination of Mr. Mansell. Counsel for Eaman desired to know the basis of the privilege which had been claimed if the documentation from Mr. Mansell's file was not to be produced and argued that, unless the documentation was made available for scrutiny and cross-examination, the Board should disregard Mr. Mansell's testimony.

79. Counsel for McKee argued the need to examine the documentation in Mr. Mansell's file and characterized the latter's testimony as containing apparent conflict which might only be resolved upon examination of the documentation in Mr. Mansell's file and cross-examination. Counsel for McKee argued that there was a real need to submit Mr. Mansell to extensive cross-examination because of his former affiliation with the Sheet Metal Workers' International Association and his change of opinion with respect to the work which he viewed at the project. It was also argued that if the documentation in Mr. Mansell's file could not be examined then the Board should not accept any of his testimony.

80. Counsel for Local 95 posed the question of how was it possible to segregate the evidence which Mr. Mansell has given in chief from evidence over which privilege was claimed. It was stressed that it was impossible to divorce the *viva voce* evidence which was apparently based upon documents with respect to which a privilege may very well exist. Counsel for Local 95 remarked on the strangeness of a claim for privilege which is raised for the first time shortly after the commencement of cross-examination and stated that a claim to privilege at this stage of the proceedings was very prejudicial to Local 95. Counsel for Local 95 urged the Board to reject Mr. Mansell's evidence in its entirety.

81. Counsel for Local 537 interpreted the letter from E. Goodman quite differently from the three other counsel. Indeed, his perception of Mr. Mansell's evidence was also quite different from the three other counsel. Counsel for Local 537 argued that Mr. Mansell, although he had his file in front of him, had referred to his diary and did not refer to any other notes in his file. At this point counsel for Local 537 stated that he had spoken to Mr. Goodman and that there was a misunderstanding about what had happened before the Board. Counsel stated that Mr. Goodman had informed him that he could speak to Mr. T. E. Foy, the director of legal services and that it was quite possible that the Board and the parties could see the three reports in Mr. Mansell's file. Counsel requested an adjournment so that he could speak to Mr. Foy and inform him of what was required.

82. Counsel for Eaman, McKee and Local 95 agreed to the request for an adjournment but stressed that in their view all of the material in Mr. Mansell's file was relevant to their cross-examination and that they were entitled to cross-examine Mr. Mansell with respect to all of such material.

83. On November 10, 1977, the Board received the following letter from Counsel for Local 537:

On Friday, November 4th, 1977 the writer attended at the Ministry of Colleges and Universities. It was the decision of the Ministry that Mr. Mansell would re-attend at the hearing before the Board and at that time would produce extracts from his diary relative to the matters in issue before the Board, as well as notes (hand-written) which he made relative to the issues in this matter and that these would be produced at the hearing for cross-examination.

However, it was decided that the three reports referred to by him in his evidence were made for the purpose of his superior and were confidential to the Ministry. It is also the Ministry's position that during the giving of his evidence, he did not refer to these reports but that they had only been brought with him at the hearing and were in a folder with other material and notwithstanding the right to claim privilege, since they were not relied on in direct examination, they should not be made available on cross-examination.

I would ask the Board to reschedule the hearing in this matter for continuation.

84. On November 25, 1977, the Board received the following letter from E. Goodman:

This will acknowledge your letter of November 18th concerning the Eaman Riggs Limited – Sheet Metal Workers Local 537 – International Association of Heat and Frost Insulators and Asbestos Workers Local 95 – (Work Assignments).

Referencing the letter of the solicitor for Sheet Metal Workers Local 537 and the meeting of representatives of the Ministry of Colleges and

Universities with Mr. Simpson, I would agree that the context of the letter is substantially correct.

With regard to the date of the next hearing, it would be appreciated if you would advise Mr. T. E. Foy, Director of Legal Services, 5th Floor, Mowat Block, Queen's Park, as he intends to attend.

85. The Board considered the representations of the parties with respect to the letters which were referred to in the two preceding paragraphs. Neither counsel for Local 95, McKee and Eaman nor the Board were permitted to see which documents Mr. Mansell referred to during his examination in chief. It was during the cross-examination by Eaman that the hint of any claim with respect to privilege first arose. This state of affairs is unusual to say the least. A claim of executive privilege is normally made at the outset and before the evidence, with respect to which the privilege is claimed, is sought to be introduced. It appears that the three reports which were referred to by Mr. Mansell in his testimony are not to be made available on cross-examination and that only an extract from his diary and some hand written notes are to be made available for cross-examination. Presumably Mr. Mansell and/or his superiors are to determine the extent of the material to be made available for cross-examination even though there was no objection to the subpoena which was served on Mr. Mansell and which covered the three reports and the diary.

86. Local 95, McKee and Eaman are entitled to cross-examine Mr. Mansell with respect to the evidence which he has already given. Section 10(c) of *The Statutory Powers Procedure Act, 1971*, provides:

10. A party to proceedings may at a hearing,

- (c) conduct cross-examination of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

Where a witness, as in the instant proceeding, has freely referred to documents in a file, which he has produced in response to a subpoena, to an extent which is unknown by either the Board or Local 95, McKee and Eaman; and where a claim of executive privilege is raised during the initial stage of cross-examination, it may not be said that Local 95, McKee and Eaman are able to conduct cross-examination of Mr. Mansell for a full and fair disclosure of the facts in relation to which he has given evidence. The Board notes that none of the parties takes issue with the claim for executive privilege. In these circumstances, the Board is not prepared to take issue with the claim for executive privilege which has been made by E. Goodman.

87. The Board finds that since it is not possible for Local 95, McKee and Eaman to conduct an adequate cross-examination of Mr. Mansell then his evidence in chief is to be disregarded by the Board. Local 537 may now decide whether it desires to proceed further with the third preliminary matter.

88. The Board requests Local 537 to inform the Registrar whether it desires to proceed further with the third preliminary matter. In the event that Local 537 does not desire to proceed further with the third preliminary matter, the Board will entertain argument on

whether it should inquire into the instant complaint prior to inquiring into the complaint in Board File No. 0747-77-JD or whether it should inquire into the complaint in Board File No. 0747-77-JD prior to inquiring into the instant complaint. The parties are also requested to endeavour to agree on the description of the work which is affected by this complaint.

89. The matter is referred to the Registrar to be listed for continuation of hearing.

0884-77-R; 1040-77-U International Union of Electrical, Radio and Machine Workers – AFL-CIO-CLC, (Applicant), v. **Lorain Products (Canada) Ltd.**, (Respondent) v. Group of Employees, (Objectors).

Reconsideration – Whether Board will reconsider earlier certification pursuant to section 7a – Effect of representation vote taken following employer's intimidatory conduct

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W.F. Rutherford and W.H. Wightman.

DECISION OF THE BOARD; March 23, 1978.

1. This is a request for reconsideration of a Board decision dated November 25, 1977 in which the Board certified the International Union of Electrical, Radio and Machine Workers under the provisions of Section 8(a) of the Act as bargaining agent for a unit of employees employed by Lorain Products (Canada) Limited.

2. The union applied for a pre-hearing representation vote under Section 8 of the Act and in a decision dated September 21, 1977 the Board found that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant union and directed the taking of a representation vote. In fact the union submitted bona fide membership evidence on behalf of 33 of the 62 employees in the bargaining unit. The representation vote took place on October 5, 1977.

3. The union filed a Section 79 complaint on September 30th alleging employer violations of Sections 3, 56, 58 and 70(2) of the Act and asked that it be certified under the provisions of Section 7a of the Act. Accordingly, the ballot boxes were sealed pending a hearing and determination of the Sections 79 and 7a matters. The Board in its decision dated November 25, 1977 found that the employer had violated the Act such that the true wishes of the employees were not likely to be ascertained by the taking of a representation vote and further satisfied itself that the trade union had membership support adequate for the purposes of collective bargaining as of November 25, 1977. The Board having satisfied itself in this regard certified the applicant under the provisions of Section 7a of the Act. The request for reconsideration of this decision dated January 24, 1978 (some 2 months following release of the Board's decision to certify) has been made by counsel not present at the hearing; the respondent retained different counsel for purposes of the request for reconsideration.

4. The Board is given a broad authority under Section 95(1) of the Act to reconsider any decision "if it considers it advisable to do so." The Board having regard to the labour relations chaos which would result if there were not some finality to its decisions has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board. The parties to Board proceedings are entitled to rely upon the decisions of the Board in the knowledge that they are final and conclusive unless evidence of the type referred to above is uncovered (See re *Detroit River Construction Ltd.* case, 63 CLLC 16,260 at p. 1117, *York University* case, [1976] OLRB Rep., April 187, *Ottawa Journal* case, [1977] OLRB Rep. Sept. 549). The Board does not permit reconsideration for the purpose of allowing a party to repair the deficiencies in its case or to reargue the merits of its case.

5. The Board has reviewed the submissions of counsel for the respondent as set out in the request for reconsideration dated January 24, 1978 and has concluded that it should not reconsider its decision in this matter. This is not a case where the respondent is seeking to introduce new evidence. Rather, it is a case where the Board is being asked to reassess the evidence already submitted at the earlier hearing. The Board has reviewed the evidence which was adduced in this matter and is satisfied that it was properly weighted and assessed in the first instance. In addition the Board is being asked to consider arguments of law which could have been made at the initial hearing but were not.

6. Having reviewed the submissions of the respondent the Board wishes to clarify its decision in certain respects. At no time during the hearing did the then counsel for the respondent ask that the results of the representation vote be revealed so as he could "lead evidence or make argument" in respect of any of the three determinations which the Board must make under Section 7a of the Act. In any event, the Board found that the conduct of the employer in the period preceding the taking of the vote was such that the true wishes of the employees were not likely to be ascertained by the vote. Even if this tainted vote had been counted and the results revealed, therefore, the results would have been of dubious probative value in making the determinations necessary to the application of Section 7a.

7. The Board admitted into evidence and considered the statement of desire signed by 4 bargaining unit employees. The statement, however, was circulated after the employer had exerted undue influence upon the employees who signed it. Accordingly, the Board assigned a considerably greater weight to the untainted membership evidence submitted in support of the application in deciding if the trade union had support adequate for the purposes of collective bargaining.

8. Section 7(a) of the Act allows the Board to certify a trade union without regard to Section 7(2) of the Act where the employer violates the Act such that the true wishes of the employees are not likely to be ascertained by a secret ballot vote and where the Board is satisfied that the union has membership support "adequate" for the purposes of collective bargaining. (See re *Dylex Limited v. Amalgamated Clothing and Textile Workers, Ontario Labour Relations Board, Iberia Marques et al* – Divisional Court – released October 25, 1977 at page 8.) If the Board were to interpret Section 7a as the respondent argues in its request for reconsideration, the section would bear no independent meaning. Section 7(2) would be the operative section in all applications for certification, even those where the employer contra-

venes the Act so as to interfere with the free expression of a secret ballot vote. If the Board were to interpret section 7a as the respondent suggests it would be required to order the taking of a representation vote (assuming the union evidences not less than 45 per cent membership support) having already determined that the true wishes of the employees are not likely to be ascertained by the taking of such a vote. The result clearly cannot be what was intended by the Legislature.

9. Having regard to all of the foregoing, the Board hereby dismisses the respondent's request for reconsideration.

0956-77-U D. Brown, M. Davidson, Blair Evans, Noel Goulet, Frank Hanlon, Paul Kowalczyk, Earle Robinson, (Complainants), v. **Consolidated Sand and Gravel, Company**, (a division of Standard Industries Ltd.), (Respondent).

Employee – Whether owner operators of trucks are dependent contractors

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Harold F. Caley and Gerry Wilkes for the complainants; Robert B. Statton, Craig Moyer, Larry Brown, Graeme Goodchild, Hugh Grightmire, John Wray and Stephen Yake for the respondent.*

DECISION OF THE BOARD; March 1, 1978.

1. The name "Consolidated Sand & Gravel Co." appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Consolidated Sand and Gravel, Company, (a division of Standard Industries Ltd.)".
2. This is a complaint under section 79 of The Labour Relations Act. The complainants, at the time this issue arose, were owner-operators of trucks used to haul materials from a pit operated by the respondent at Pickering. The gist of the complaint is that on September 12, 1977 the respondent directed that unless the complainants signed an agreement with one of a number of brokers named by the respondent, they would not be able to perform any more work for the respondent. The complainants allege that this action was taken by the respondent in an attempt to frustrate the intention of the complainants to join the Teamsters Union. The complainants say that the conduct of the respondent is in breach of sections 58, 61 and 66 of the Act.
3. The respondent raised a preliminary argument to the effect that the complainants were not employees within the meaning of the Act, but were independent contractors and, consequently, were not entitled to bring a complaint.
4. The complainants argued that whether they were employees or not, they were entitled as "persons" to lodge a complaint under section 79 of the Act.

5. The Board, in a decision dated October 13, 1977, ruled that the complainants must establish that they are employees within the meaning of the Act as a necessary condition to the granting of relief by the Board.

6. Accordingly, the first question to be dealt with is whether the complainants are employees within the meaning of the Act. A second question may then arise as to whether the respondent has dealt with the complainants contrary to the Act as alleged.

7. Counsel for the complainants took the position that the evidence would support the finding that the complainants were employees of the respondent in the generally-understood meaning of the term, but that, in any event, they were dependent contractors and fell within the terms of subsections (1)(ga) and (1)(gb) of section 1 of the Act. These subsections provide as follows:

1.-(1)(ga) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(gb) "employee" includes a dependent contractor.

8. Each of the complainants is the owner-operator of a truck which he uses in the haulage of sand and gravel. In each case, the complainant worked virtually exclusively out of the respondent's pit at Pickering. This work accounted for not less than 95 per cent of the respective incomes of the complainants.

9. The complainants were required to bring their trucks to the pit each morning and to line up to await directions from the dispatcher as to what load to pick up and its destination. The necessary papers covering delivery and receipt were prepared by the respondent company and given to the driver for completion. The materials, however, are ordered by customers of the respondent and the contract of sale and delivery is made directly between the respondent and its customers without any intervention by, or consultation with, the complainants. The complainants deliver the material as directed by the respondent's dispatcher and obtain an acknowledgement of delivery from the customer. The driver does not collect money from the customer except upon the very rare occasion when a C.O.D. delivery is made.

10. Some of the complainants used their trucks briefly in snow removal work at a time when there was no work available at Consolidated. Occasionally, work was done for other sand and gravel companies, but the evidence indicates that this was exceptional and that it was done by arrangement with those companies and the respondent's dispatcher. The drivers have no customers of their own.

11. There was evidence that one driver, Brown, was "laid off" and then recalled by

the respondent. The respondent objected to the use of these terms. There seems to be no doubt, however, that Brown's services as a hauler were cut off by the respondent for a period and then were resumed at the request of the respondent.

12. As already stated, the drivers report to the pit each morning and line up to await a call from the dispatcher to pick up and deliver materials. This is done on a first come first call basis. There is a degree of control exercised over the drivers which limits, at the least, any choice as to acceptance or refusal of a load. For instance, one of the complainants told the Board that a driver was dismissed because of his refusal to go to Stouffville to pick up a load. The witness for the complainants did say, however, that he reserved the right to refuse a trip if it would put him in the hole. An employee, Evans, on the other hand, was sent home for a day when he felt the money was insufficient for the trip to which he was assigned.

13. The work required to be done at the request of the respondent was done by the individual complainants who did not employ others to drive their trucks. There was one exception when an owner-driver who was ill had someone else drive his truck for him.

14. Each complainant is responsible for the purchase, licensing, maintenance and repairs of his own truck. He also arranges for the financing of the purchase of his truck. In some cases, the respondent helped in obtaining financing by indicating that work would be available for the driver concerned.

15. The owner-drivers are required to enter into a written agreement. It was the contention of the respondent that this requirement was purely for insurance purposes and was not intended to be a contract of employment. The respondent argued that the document was a contract of employment and speaks for itself. The agreement is reproduced below:

AGREEMENT FOR HAULAGE SERVICES
BETWEEN

<u>(The Company)</u>	<u>Trucker Number</u> <u>Number Alloted by</u> <u>Company (Hirer)</u>
----------------------	-----------------------------------------------------------------------------

AND

[illegible]

ADDRESS _____

CITY OR TOWN	PROVINCE	POSTAL CODE
-----------------	----------	----------------

THE VEHICLE OWNER AGREES To provide haulage services if, as,
and when required by the company by means of the
vehicle or vehicles owned or operated by him on
the following terms:

1. Does Owner have other Trucks? _____
Does Owner Employ other Drivers? _____
If Owner Employs other Drivers state Workmen's Comp.
(Firm No.) _____
2. **INSURANCE CARRIED BY OWNER OF VEHICLES**
Name of Insurance Company _____
Policy Number _____ Amount of P.L. & P.D. _____
(Min.) \$50,000
3. **THE VEHICLE OWNER'S RESPONSIBILITY**
- (a) He will pay all driver's and other wages, costs of operations and maintenance, workmen's compensation, income tax deductions, holiday pay, etc., applicable to these vehicles and drivers, and the owner will pay and save the company harmless from any and all claims for damages caused by the vehicles. The owner will keep the above described insurance paid up and in force during the life of this agreement.
- (b) He will immediately notify the company of any event such as vehicle accident or breakdown which would prevent or delay delivery to the customer.
- (c) He will immediately notify the company of any customer disputes so that they can be dealt with by a company representative.

- (d) If he is unable to deliver at the location directed he will immediately request by telephone alternate delivery instructions from the plant from which he was dispatched.

4. RATES OF PAYMENT will be in accordance with the company's rate schedule in force when haulage services are provided.

1. Payment, if by the hour, will be for time the vehicle is actually working. Working time to commence when the vehicle reports pursuant to the company's instructions at the loading site, to include hauling time from loading site to the delivery site, and to end with last load unloaded at designated delivery site. All downtime such as breakdowns, meals, vehicle servicing to be excluded as well as any time wasted by the driver.
2. Where the company is paid by quantities certified by the Ministry of Transportation and Communications, or other owner or prime contractor, the quantities so certified which may be shown by official weight slips when and to the extent applicable to the vehicle, will govern the amount to be paid for the haulage.
3. Pay period will be twice monthly unless otherwise stipulated.
4. Pay dates will be as soon after the pay period ends as is reasonably convenient to the company.

5. RECEIPT OF COPY HEREOF IS ACKNOWLEDGED BY THE OWNER

Effective as of _____ 19_____
 Valid until _____ 19_____
 Dated at _____ Plant_____
 This _____ Day of _____ 19_____
 (Vehicle owner)
 (The Company)

Per _____
 (Plant Superintendent)
 (District Manager)

16. It should be noted, however, that the identical agreement has been signed with haulage companies and with persons owning more than one truck.

17. The drivers are paid on a ton-mile basis and all are paid on precisely the same basis which is related to a schedule worked out by the Toronto-York and Durham Regional Truckers Association. There are no individual contracts or deals made by the drivers with the respondent, in the sense of price bargaining, outside of, or independent of, the commonly signed document set out above.

18. There was evidence that at one stage, the truck owners withdrew their services because of dissatisfaction with the rates and that some compromise was reached.

19. The drivers are paid every two weeks by the respondent's cheque. The amount is calculated on the ton-mileage basis verified by customer receipts. The driver is responsible for his own income tax and there are no deductions from his cheque, unless he has purchased gasoline from the company when the price is taken off the money due to him. No fringe benefits are supplied by the respondent.

20. It is of significance, in determining their status, to note that the complainants have worked for Consolidated for a number of years. Brown has the shortest service, having commenced in 1976. Davidson has 5 years, Evans 3 years, Goulet 5 years, Hanlon 2½ years, and Robinson 10 years.

21. There are other owner-drivers working out of the respondent's pits who own and operate two trucks. It is clear that such people were and are regarded by the company itself as being in a different category to those owning and operating only one truck in the respondent's service. The two-truck owners signed the written agreement, but it was made clear by the respondent that the respondent's requirements (that the owner-operators work through a broker) did not apply to those who owned and operated two trucks.

22. In considering the question as to whether the complainants are dependent contractors and, therefore, employees within the meaning of the Act, we wish to repeat and adopt the language employed by the Board in *Superior Sand, Gravel and Supplies Ltd.*, Board File No. 1308-76-R, at paragraphs 19 and 20 of that decision. The paragraphs read as follows:

19. In cases such as this one the Board must distinguish the workman from the true entrepreneur. The task is not an easy one since there exists no clear line of demarcation. Determining who falls within the Act as a dependent contractor is essentially a factual exercise. The legal test, found in section 1(1)(ga) of the Act provides the Board with only a point of reference but, as the Board has already noted in *Adbo Contracting Ltd.*, *supra*, it is a more useful and less confusing reference point than those adopted by the Board prior to the enactment of the dependent contractor provisions. This new point of reference leads the Board directly to the substance of the economic relationship, and away from those matters of form which merely obscure its reality. While it may be quite true that the Board might reach the very same result by recourse to the old points of reference, this new test provides a more direct and understandable route to the ultimate result.

20. The type of economic dependence and the kind of business relationship existing in any given case are the primary indicators of whether a person is a dependent contractor. These indicators must be applied in a comparative manner, the fundamental question always being whether the person's relationship with another more closely resembles the relationship of an employee than that of an independent contractor. The result of this exercise, of course, depends largely upon the facts brought before the Board in any particular case. In all cases, however, the Board is mindful that it should not extend the protections of *The Labour Relations Act* to the true entrepreneur.

23. The question before us then is whether the complainants perform works or services for the respondent for compensation or reward on such terms and conditions that they are in a position of economic dependence upon, and under an obligation to perform duties for, the respondent, more closely resembling the relationship of an employee than that of an independent contractor.

24. There is to be taken into account, in an attempt to reach a decision in the matter, the fact that the owner-operators purchased their own trucks and were responsible for their maintenance and operation. They pay for P.C.V. licenses and for insurance. Furthermore, they are responsible for paying their income tax without deductions by the respondent and do not get vacation pay or other fringe benefits which might be indicative of employee status. There have been occasions when the truck owners have been able to work at snow removal for corporations other than the respondent. The agreement for haulage services under which they operate is precisely the same as that under which the brokers or persons operating more than one truck work. It is also a fact that when they line up for work at the pits, they are not required to do other work for the respondent, if no loads are available. The respondent pointed out that in addition to the foregoing, there was no contractual obligation to work for the respondent, the contract merely providing for work if, as and when required, as it did for brokers.

25. As to the latter point, it is obvious that the requirement that the owner of a single truck be ready for work if, as and when required, places a very much more restrictive limitation on his freedom of action than it does on a multi-truck owner. The former is personally at the beck and call of the respondent in the manner of an employee, while the latter, of course, is not.

26. The number of years for which the applicants have been connected with the respondent and the fact that during those years they have derived 95 per cent (more or less) of their income from their relationship with the respondent, are far more indicative of an employee relationship than that of one with an entrepreneur or independent contractor. In addition, the disciplinary control exercised by the respondent, intermittent though it may have been, conforms more to the employer-employee relationship than it does to that between an independent contractor and a contractor. Also of importance is the fact that the customers to whom the drivers made deliveries were customers of the respondent who dealt directly with the respondent in the ordering of materials and the fixing of the price to be paid. The drivers were not involved in an independent bargaining, either with the respondent or the customer, as to the price of the goods or the delivery charge. The delivery slips were returned to the respondent who billed the customer directly. There was thus clearly nothing of

an entrepreneurial nature in the driver-customer dealings. The business of the sale and delivery of materials belonged solely to the respondent. Indeed, any customer disputes were to be dealt with by the respondent.

27. In the result, we find that the complainants were at all material times in a position of economic dependence upon, and under an obligation to perform duties for, the respondent, more closely resembling the relationship of an employee than that of an independent contractor. We accordingly find that the complainants are dependent contractors and employees of the respondent within the meaning of the Act, and are entitled to file a complaint under section 79 of the Act.

28. We now proceed to deal with the allegations brought under section 79 in which it is claimed that the respondent has dealt with the complainants contrary to the provisions of sections 58, 61 and 66 of the Act.

29. The complainants say that the conduct of which they complain occurred at a meeting of the owner-operators which was called by the respondent on September 12, 1977.

30. The evidence is that a meeting was called on that date at which the respondent was represented by Craig Moyer, General Manager, Larry Brown, Supervisor of Sales, and Graeme Goodchild, Salesman. The meeting commenced at about 4 o'clock in the afternoon.

31. At the meeting, Moyer told the trucks that the company was introducing a new policy with respect to haulage of its materials. The policy was that the company would no longer deal with individual truck owner-drivers but would switch to the use of large corporate brokers to supply the necessary trucks. The assembled truckers were told by Moyer that the policy was effective immediately. When one of the driver-owners asked what they would do the following day, Moyer told them that they would not work unless they operated through a broker. He repeated that the new policy was that the respondent intended to use brokers and that it would not use the truckers on an individual basis. The respondent had always used brokers in addition to the individual owners. The new policy simply involved the switch to the exclusive use of brokers.

32. At the meeting, the respondent produced a list of six brokers. The allegation made by the complainants is that the company said that the drivers must telephone one of the companies on that list and agree to work for one of them. The evidence given by the company was that the list was simply one of convenience for the drivers. It was compiled with reference to operations of the company across the province and, therefore, contained names of brokers in places other than Pickering where the new policy was also to be introduced.

33. We find that there was a misunderstanding on the part of the drivers with respect to the intent of the list and the fact is that in any event, most of them signed on with a broker whose name is not on the list, but who was nevertheless acceptable to the respondent.

34. There was also a dispute as to whether the company at the meeting, tried to induce the drivers to enlist with one particular broker with whom an arrangement had been made to waive his brokerage fee for a period of three months. There is no doubt, upon the

evidence, that this particular broker was discussed at the meeting and that the respondent mentioned this broker more than once. In any event, nothing really turns upon this since it is evident, as indicated above, that the drivers were free to choose their own broker. The requirement remained, of course, that they choose a broker if they wanted to work.

35. The complainants testified that Moyer suggested that they could form their own company to deal with the respondent. Moyer denied saying that. There is, however, evidence of a company witness which tends to support the complainants on this point.

36. The company's intent became manifest in positive terms when the truckers lined up at the pit on the two following days and were not loaded. As soon as they became connected with a broker, however, their trucks were loaded.

37. As we have already indicated, it is the contention of the complainants that the foregoing action was taken by the respondent for the purpose of frustrating the complainants' intent to join the Teamsters Union.

38. The respondent denied that it had done anything contrary to The Labour Relations Act and submitted that it had simply initiated a policy throughout all of its plants to alter its trucking system to use trucking companies or brokers exclusively. The company chose September 12th to announce this change in policy, not only to the truckers at its Pickering establishment, but at other points of its operations where owner-operators of single vehicles were used in the business.

39. Hugh Grightmire, who is Chairman of the Board and Chief Executive Officer of Standard Industries Ltd. (of which Consolidated Sand and Gravel Company is a division), testified that prior to September 12, 1977, the trucking system used comprised two categories. In one, the respondent hired corporations to supply trucks. The other category comprised individual truckers who owned one truck and sometimes two trucks. He testified that the system was changed in 1977 at his orders. He said that he gave orders to Craig Moyer on September 7, 1977, and spelled out to him the how and why. The changes were discussed again with Morton on September 8th and, Grightmire said, Moyer reported back to him on September 12 that he had made the changes in accordance with instructions.

40. It was Grightmire's testimony that trucking had been a predominant problem for the respondent. He said that he spoke to Brown, the sales manager, in September of 1976 and asked him to make changes. He also spoke to Moyer in 1976 about the same thing. In February of 1977 he entered into abortive negotiations for the purchase of a trucking company. In early June and July of 1977 he made trips to the United States and studied the method of brokerage used in New York. He stated that in June the respondent company started a large aggregate job for Pitts Construction. He said that in August the Pitts company phoned about the respondent's trucking ability and threatened to cancel the order.

41. It was also the position of the respondent that considerable advantage would be derived from the use of brokers in that it would no longer be necessary to make out individual cheques for drivers, since one cheque to the broker would suffice. The truckers, incidentally, said that this was virtually the main reason given by Moyer at the meeting on September 12th.

42. Another reason advanced by the respondent for the switch in trucking methods was that the use of brokers opened up a larger pool of available trucks. It was felt that this pool was necessary because the business was expanding and was being hampered by the lack of trucks during periods of peak demands. It was said that if the respondent used brokers exclusively, it would have more clout with them when the need arose for extra trucks. This was not the case, the respondent said, when you only turned to the brokers in times of emergency. It was Moyer's testimony that the company had started moving towards a greater use of brokers as far back as 1975 and had taken the use from 46% to 64% on a gradual increase.

43. Moyer's evidence as to the business reasons for switching the trucking system is the same as the above. He said that he had conducted a study of the trucking methods because of poor service at Pickering and had reached the same conclusion as Mr. Grightmire. He, too, felt he would have more clout with the brokers if he dealt with them continuously and without the use of individuals. He called meetings at the respondent's operations at Pickering and at Stouffville on September 12th and one at Mono Mills on September 13th. At the rest of the plants the announcements were made by the sales or plant managers.

44. It was the respondent's position that in taking the action it did on September 12th, it was motivated purely by the business considerations outlined above and it had nothing to do with the Teamsters. The switch was a company-wide change of policy and was not a move directed solely at Pickering where the complainants operated. The respondent operates out of three stone quarries and five sand and gravel pits.

45. Mr. Grightmire testified that he knew that if the drivers went with the brokers, "I could not be certified". He said that he was aware that by getting rid of the single operators he would have avoided certification. He said, however, that he did not know that the truckers had voted in August to join the union. He said he knew nothing about the union. He concluded his cross-examination however, by saying that the union may or may not have been a consideration, but it was not the purpose.

46. Moyer was aware that the owner-drivers working out of Pickering were members of the Toronto, York & Durham Regional Truckers' Association. This was an organization formed in 1974 to better the general trucking conditions of operators and owners of P.C.V. Class "F" licence holders, among other objects. He was aware that they had been trying to become certified but said that the meeting of September 12th had nothing to do with union activities.

47. The complainants led evidence intended to show that the respondent was aware of the intentions of the truckers to join a union, that the denials of such knowledge were not credible, and that the knowledge was a factor in motivating the company to act as it did. The respondent characterized the complainants' evidence as illusory.

48. John Gallagher gave evidence on behalf of the complainants. He has worked at the respondent's pit for about 9 years. He operated more than one truck and was not affected by the announcement made on September 12th.

49. Gallagher's evidence was that he and Kowalczyk were the spokesmen for the truckers at monthly meetings called by the respondent. At those meetings, the respondent

would be represented by Frank McNaughton, the salesman at Pickering, and a Mr. Brown from the head office. Usually, all the truckers would be at these meetings. The meetings were used to discuss whatever problems might have arisen. They were called by notice signed by McNaughton or by word of mouth through the dispatcher. McNaughton would take notes on the discussions which he took back to his superiors and would bring the answers to the problems back from them.

50. Gallagher said that the subject of unions was discussed at the meetings at different times. At one of these meetings he asked McNaughton if he knew what certification meant. He then told McNaughton that "instead of arguing about rates – we would be parked on the hill – if all were certified we would sit on the hill at Consolidated's expense – that is one thing that certification would mean". The witness said that that was the only thing discussed about certification.

51. Kowalczyk said that he and Gallagher had a conversation with McNaughton, who occupied the position now held by Goodchild, on July of 1977 and told him that the drivers had no alternative but to "go union". He also referred to the conversation with respect to certification related by Gallagher.

52. Several witnesses testified that a vote was held about the middle of August in which the truckers voted to join a union. No specific union was agreed upon at that time. Earl Robinson stated that on the morning following the August meeting, he was asked by Frank Clements, the dispatcher at the Pickering plant, what he thought of the union. He replied that he was not sure what his feelings were. Frank Clements was also the person who notified Robinson and Gallagher to attend the respondent's meeting of September 12th.

53. It emerges clearly, even on the evidence called by the respondent in reply, that the August meeting was a thing well-known in the Pickering office by Steven Yake, who appears to have enjoyed the title of Office Manager but said he was really only a clerk, and by Frank Clements. It was also known to others in the haulage field.

54. Larry Brown, who was called by the respondent and is its Sales Manager, said that Frank McNaughton reported to him but had never mentioned unions to him. McNaughton, incidentally, was released around the end of August and Goodchild took his place. Brown said that there was a great deal of talk about meetings being held by the Truckers Association but that unions were never mentioned. He said there was talk throughout the industry about Association meetings. He was generally aware of a case in which the Mount Nemo Truckers Association had been issued a certificate in February of 1977 as bargaining agents for dependent contractor drivers at Nelson Crushed Stone. This, obviously, involved mention of a union in the very haulage area with which we are concerned.

55. The Toronto-York & Durham Regional Truckers Association issued an undated notice calling for a general meeting to be held on Thursday, September 15, 1977. The notice was as follows:

GENERAL MEETING

The Toronto-York & Durham Truckers Association will be holding a

meeting on Thursday September 15, 1977 at 8:00 p.m. at the U A W Hall, Hunt Street, in Ajax.

All owners and operators are invited to attend, whether paid up members or not.

We are looking forward to being accepted by The International Brotherhood of Teamsters in relation to forming "*our own local union*" "*as a Division*" of the Teamsters Union.

A representative of the Teamsters Union will be on hand to relate the advantages and benefits of being a part of an organized Union.

This we feel is the most important meeting which will take place in relation to the welfare and survival of all independent single tandem and tractor trailer dump truck people in the province.

Be sure to attend and give us your feelings in this regard.

56. Gerald Wilkes gave evidence and stated that the above notice was prepared on September 6th and mailed out to the members on September 7th, 1977. Kowalczyk received his copy of the notice on Friday, September 9th. Another trucker, Brown, received his notice on the 8th or 9th. Robinson received his notice on Thursday, September 8th, 1977. Gallagher found out about the meeting from Robinson who showed him his copy at the pit on Friday morning, September 9th.

57. Wilkes testified that 500 copies of the notice of the meeting were made and sent to other pits and quarries for distribution a couple of days before the meeting. There was a meeting of the Executive of the Association on September 5th and the members of the Executive picked some up to distribute.

58. There was another document put into evidence by the complainants. It reads as follows:

We, the undersigned – as owner-operators in the business of providing a service of transportation to the aggregate industry in Ontario – hereby desire to apply to the International Brotherhood of Teamsters for the issuance of a Charter in relation to forming our own local union as a division of the Teamsters Union.

59. The evidence is that this document was drawn following discussion with the Teamsters and was designed to be used as an indication to that union of the desires of the owner-operators to be represented by it. Wilkes said it was drawn up on Monday, September 5, 1977. The respondent pointed out that this was Labour Day. In any event, those who received this document were told not to sign it because the Association did not want to let the companies know what its members were going to do. The evidence of the complainants is that the document was signed on September 12, following the meeting with the respondent and that all signed at the same time.

60. The company took the position that this latter action on the part of the complainants was really the only union activity in which the truckers had indulged and that obviously did not take place until after the announcement of the change in policy. The respondent further argued that there was nothing in the evidence, in any event, to indicate that it had any knowledge of the existence of the document prior to the meeting. We are in agreement with that submission of the respondent. That, however, does not dispose of the matter.

61. Section 79(4)(a) of the Act provides that on an inquiry by the Board into a complaint of the nature of the present one, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer.

62. We have little difficulty in finding that for some time prior to September 12th the company had contemplated a switch in its hauling operations which it brought about on that date. Wilkes, the President of the Truckers' Association, in his evidence said that he heard talk about going to brokers about a year and a half earlier. He said it would have been in March or April. There is a suggestion in Moyer's testimony that the usage of brokers had been gradually on the increase for several years.

63. The evidence also indicates that for about the same period of time a debate had been going on among the members of the Trucking Association as to whether they should seek union representation, and if so, by what union. Part of that debate was settled at the mid-August meeting and the remainder by the signatures on the final document above on September 12th after the meeting with the company.

64. We also are satisfied upon the evidence that the respondent was aware of the fact that its drivers had been considering joining a union for some time in 1977 and that it knew of the August meeting and its purpose. We find it incredible that the knowledge of the notice of the meeting would not have been communicated to the respondent's higher officers by Clements or Yake who clearly were aware of it.

65. There is no evidence which goes directly to the point of establishing that the company was aware of the meeting called by the union for September 15th. The evidence is that the notices were mailed a week in advance of the meeting and that they were the subject of discussion around the Pickering pit and elsewhere, at least among the drivers.

66. It is to be noted, however, that there was no convincing explanation by the respondent as to why the switch which had been so long in contemplation had to be made on September 12th which was, of course, just three days ahead of the date set by the truckers to consider joining the union. Moyer was unable to explain why a decision such as this should be implemented in the middle of a pay period. More to the point, there was no credible explanation offered as to why a decision of such deep concern to the truckers had to be implemented the following day. It is to be remembered that the drivers asked for an extension of time which, in the face of the company's refusal, they reduced to a period of hours, so they might consider the matter. This was also refused. The question occurs as to what was the terrible urgency that suddenly shot the respondent into an action which it had been quietly contemplating for so long. The conclusion is inescapable that the catalyst was the realization that the drivers were about to organize. Considerable persuasion towards reaching that conclusion is found in the admission of Mr. G. Grightmire referred to above where he said that in the decision-making, the union certification may have been a consideration but it was not the purpose.

67. Under the provisions of section 79(4)(a) of the Act where the Board is inquiring into a complaint that a person has been dealt with contrary to the Act, the burden of proof that any employer or employers' organization did not act contrary to the Act, lies upon the employer or employers' organization. That onus lies upon the respondent in the present case. Furthermore, the Board has long held that anti-union motivation does not have to be the sole reason or even the predominant reason for the action complained of for the Board to find that a breach of the Act has occurred.

68. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board said:

Given the requirement that there be absolutely no anti-union motive the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

It is in the light of the foregoing that the actions of the respondent, which are the subject of the complaint, must be weighed.

69. In the present case, it is plain that the complainants were in the process of exercising their right under the Act to join a trade union of their choice when their relationship with the respondent was severed.

70. Even if we accept that the respondent had been contemplating the change in its trucking arrangements for some time, and keeping in mind the fact that the change was implemented in all of its pits at approximately the same time, the Board finds that the action taken at the Pickering pit with respect to the complainants herein was tainted by anti-union motivation and was an attempt to ensure that the respondent would not be required to deal with its employees through a trade union.

71. The Board accordingly finds that the actions of the respondent on September 12, 1977 were contrary to the provisions of section 58(a) of The Labour Relations Act.

72. Counsel for the complainants requested at the hearing that in the event the Board should find that a breach of the Act had occurred, it leave the matter of remedy to the parties and remain seized of the question of specific remedy.

73. The Board therefore directs that the parties meet forthwith and attempt to arrive at a settlement of the matter. The services of a Labour Relations Officer will be made available to the parties if they so desire. In the meantime, the Board remains seized of the matter to deal with the question of remedy, if that becomes necessary.

1880-76-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. **Dufferin Aggregates** A Division of Dufferin Materials & Construction Ltd., (Respondent).

Employee – Whether owner-drivers of gravel trucks are dependent contractors

BEFORE: M. G. Picher, Vice-Chairman and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *E. G. Posen and M. Hart for the applicant; W. S. Cook, F. V. DeWitt, B. G. Carpenter and J. P. Sibold for the respondent.*

DECISION OF THE BOARD: March 13, 1978.

1. The name: "Dufferin Aggregates Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Dufferin Aggregates A Division of Dufferin Materials & Construction Ltd.".
2. This is an application for certification for a bargaining unit consisting of "all drivers employed by, or under contract to, the respondent at Milton, Ontario, who provide their own vehicles for the purposes of the job". The proposed bargaining unit includes all of the owner-drivers of vehicles engaged in the delivery to the respondent's customers of aggregate materials from its quarry.
3. The issue raised is whether the owner-drivers are "dependent contractors" within the meaning of section 1(1)(ga) of the Labour Relations Act. In the event that the Board should determine that the owner-drivers are dependent contractors and therefore employees subject to the Act, counsel for the employer raises two preliminary objections. Firstly, he argues that the dependent contractor provisions of The Labour Relations Act are *ultra vires* the Province and contrary to the provisions of the federal Combines Investigation Act. Secondly, he submits that the Board should alter its procedure in determining the list of employees for the purposes of certification of a bargaining unit of owner-drivers working out of an aggregate quarry. Specifically, he maintains that the Board should not apply the "30 day rule", whereby employees must be at work both in the period 30 days before the date of application and 30 days after the date of application if they are not at work on the application date, in order to be included for the purposes of the count of employees on an application for certification. Counsel argues that given the nature of the respondent's operations the Board should use a 90 day period prior to the date of application in order to arrive at a more representative list of employees.
4. The question of the legislative competence of the Province and the alleged conflict with the Combines Investigation Act was dealt with by this Board in *Superior Sand, Gravel & Supplies Ltd.*, (Board File No. 1308-76-R Feb. 8, 1978). As was noted in that case, although the Board has a duty not to apply The Labour Relations Act so as to extend its operation beyond the areas of provincial jurisdiction, it is not the function of the Board, but rather of the Superior Courts, to adjudicate upon the constitutional validity of the Board's own statute. And in *Canada Crushed Stone* (File No. 1070-77-R Dec. 8, 1977) the Board declined to apply the "dependent contractor" provisions of The Labour Relations Act to

owner-drivers who are also employers by virtue of the fact that they operate more than one truck through the use of their own employees. The very effect of that decision is to avoid the sponsorship of pricing arrangements under the guise of collective bargaining among entrepreneurs contrary to the Combines Investigation Act. The respondent's motion in respect of the constitutional validity of the dependent contractor provisions of The Labour Relations Act is therefore denied.

5. We turn to the question of the employment status of the truck owner-drivers who are engaged in the delivery of the respondent's aggregate materials. Prior to the enactment of sections 1(1)(ga), (gb) and 6(4) of the Act, the issue presented to the Board was whether owner-drivers of trucks engaged in hauling on a regular basis for the same enterprise were employees or independent contractors. (eg. *General Concrete of Canada Ltd.* [1975] OLRB Rep. Mar. 234). The coming into effect of those provisions on January 1, 1976, made available the benefits of collective bargaining to dependent contractors, a group of persons whose employment relations cause them to fall between the traditional concepts of "employee" and "independent contractor".

6. A number of Board decisions have dealt with the status of owner-drivers engaged on an on-going basis in the delivery of aggregate material for one producer. (*Nelson Crushed Stone* [1977] OLRB Rep. Feb. 104, *Adbo Contracting Company Ltd.* [1977] OLRB Rep. Apr. 197, *Indusmin Limited* [1977] OLRB Rep. Sept. 552, *Canada Crushed Stone* (Board File 1070-77-R, Dec. 8, 1977), *Superior Sand Gravel & Supplies Ltd.* (Board File 1308-76-R Feb. 8, 1978)). While the Board's approach to the issue of the status of persons alleged to be dependent contractors must necessarily develop on a case by case basis, a pattern of applicable principles has emerged from the foregoing decisions at least insofar as the dependent contractor concept applies to owner-drivers engaged in the hauling of aggregate material.

7. In determining the status of owner-drivers of trucks the Board is concerned with the substance rather than the form of the relationship between the trucker and the quarry which uses his services. The presence or absence of a contract of employment or of a haulage contract is not determinative. Where a written contract exists, it may provide useful indicators of the true relationship between the parties. It may also tend to obscure it.

8. Likewise, as the very definition of "dependent contractor" found in the Act suggests, the furnishing of a vehicle or other equipment by the owner-driver does not of itself take the person in question outside the definition. The Board must examine all of the facts that describe the terms and conditions under which the owner-driver works with a view to determining whether he and the party that has the benefit of his services are in such a relationship as to give rise to a *de facto* obligation to perform duties because of an evolved economic dependence. The question is whether the overall relationship more approximates the bond between employer and employee than the kind of association normally found where services are provided by an independent contractor.

9. Thirteen truckers were examined in the instant case and the facts are substantially the same as applied to each of them.

10. Each trucker owns and drives a single vehicle; for the most part they are tandem trucks, although a few are tri-axle. At the present time it appears that each trucker is free to determine the type and size of the vehicle that he purchases when he begins to deliver for

Dufferin. Four or five years ago some drivers newly engaged by Dufferin were required to purchase and operate single-axle trucks for the first year or two of their relationship with the company. That was so because at that time the company was engaged in providing material on a regular basis for small driveway jobs which required smaller capacity trucks. That is no longer the case and as long as two years ago Dufferin stopped imposing any such requirement; as a result, given the nature of Dufferin's business and the size of load it normally delivers, the truckers have moved almost exclusively to the use of double-axle vehicles.

11. An outstanding feature of the evidence is the length of service of the truckers at Dufferin. The term of service of the 13 truckers examined varied from a minimum of two and a half years to a maximum of sixteen years; taking the average of those examined, the typical trucker hauling aggregate out of Dufferin's Milton quarry has been there for over six years.

12. A second feature is the constancy of the relationship between the trucker and the quarry. Most of the owner-drivers examined attributed 100% of their gross income in the last year to their work for Dufferin. Some of them occasionally haul snow for municipalities in the Toronto area during the slack winter period. However, that work seldom exceeds one full week in the year, and the balance of their working time is devoted exclusively to Dufferin.

13. Individual truckers may also purchase a load of aggregate from Dufferin to deliver it on their own account; this is not done, however, as a matter of private enterprise. It appears only to be done in the course of doing a favour for a friend whereby the trucker will deliver the material to a friend and charge him for the cost of the material but not for the cost of transportation. Those truckers who have performed that kind of favour seem to have done so only once or twice in the period of three to five years and, even then, only on a one-load basis.

14. There is no question that the truckers own their own vehicles and that Dufferin is not directly involved in the purchase or financing of their trucks. The truckers purchase their vehicles independently and are responsible for obtaining their own financing. They are likewise responsible for the maintenance of their trucks as well as for insurance and the purchase and renewal of their Public Commercial Vehicle licences. The evidence establishes, however, that Dufferin has provided a letter of reference to enable a trucker to obtain financing for the purchase of his truck; the letter was in the nature of an assurance to the lender that the trucker would have a steady flow of income arising out of work to be performed for Dufferin. At least one trucker testified that a similar letter was provided to him to assist in obtaining his first P.C.V. licence. While Dufferin does not supply parts or service to the truckers for their vehicles, it does sell them gasoline at a reduced rate. Gas purchases are deducted from the pay cheques which the truckers receive every Friday. No deductions are made by Dufferin in respect to income tax, unemployment insurance, Canada Pension Plan premiums or OHIP premiums, those all being the individual responsibility of the owner-drivers.

15. The way a trucker first begins to work at Dufferin's quarry is interesting for what it reveals about the relationship between the owner-driver and the respondent. Most of the truckers examined testified that they had no truck when they first approached Dufferin and that they proceeded to buy their vehicle when they had the undertaking of the quarry that it would provide them with steady work.

16. Of particular interest is what happens when a new trucker purchases the truck of an owner-driver who is leaving the quarry. At least two of the truckers examined testified that they purchased their first truck from an owner-driver who was leaving the Dufferin quarry and that when they did so they purchased both the truck and the "job". M. D'Alonzo related that two and a half years ago he began hauling at the Dufferin quarry by buying the truck of a man who had worked there for eight or nine years. He paid \$7,600.00 of which \$2,500.00 was payment for the job. The deal was not finalized until both parties had consulted with the quarry foreman, Campbell Fairinback, and obtained his consent. While on the one hand that transaction might suggest the existence of "goodwill" in the business of the individual trucker so as to indicate something akin to a private business enterprise, on the other hand it must be viewed as demonstrating that, for an owner-driver, a berth at the Dufferin quarry is a valuable niche with long-range security attached.

17. In most respects the evidence before the Board regarding the day-to-day functions of the owner-drivers does not differ substantially from what was found in the Board's earlier cases cited above. The truckers do not wear a uniform or any other outward sign that would identify them with Dufferin Aggregates. Some of the trucks bear a Dufferin logo; it appears that this is a vestige of a time several years ago when the stickers were distributed by the respondent for display on a voluntary basis. Some of the older trucks at the quarry still carry the logo while a good number of them do not. The trucks bear numbers assigned by the respondent to identify the truck with its load; that number appears on the way-bill that goes with each load. Numbers on the trucks are also used for recording gasoline purchases from the respondent.

18. Each trucker drives his own vehicle. They are paid on the basis of ton miles, calculated on rates fixed within a zone system. The truckers appear to have no real say as to which loads they will be given and there is no evidence that any has ever refused a load. They have to accept the good loads, meaning those involving the least delay in delivery time and the least risk to their truck, with the bad loads, according to the luck of the draw. They are not paid for waiting time at the respondent's quarry and, while there is provision in the way-bill for payment for waiting time at the delivery site, the evidence establishes that customers will seldom agree to sign that portion of the way-bill whereby they become responsible for compensating the trucker for waiting time. Even where a customer does agree to pay for waiting time at the delivery site, the payment is channeled through Dufferin and is based on a rate established by Dufferin in negotiations with the entire group of owner-drivers. It is not a matter of individual negotiation between the trucker and the customer.

19. While the evidence would indicate that the owner-drivers are free to determine what hours in the day they will work, the consistent pattern is that their hours of work coincide exactly with the hours during which the respondent's quarry is open. During the slower winter season a few of the truckers occasionally engage in carrying snow, as indicated above, but they do not do so if work is available at Dufferin. Moreover, from time to time during a slack period Dufferin may relay to the truckers the word that work is available for them at another quarry if they wish to take it. In that circumstance they have no obligation to do so and it appears that they often decline out of a belief that the other quarry will give them a load that might endanger their truck.

20. Time is obviously important to the truckers and the time of the taking of the first load in the morning may have a bearing on how many loads can be hauled in a given day.

That in turn will tell on the trucker's income for the day. As a result, the owner-drivers and respondent have devised a line-up system for the first load of the day. Each morning the first loads are taken by one of the three groups of trucks, with the groups rotating on a daily basis. Each of the groups is organized according to seniority so that the truckers with longer service with Dufferin will load before the more junior truckers. Some insight into the length of service of the owner-drivers is found in the evidence of S. Gagas. While Mr. Gagas has hauled for Dufferin for some eight years, for the purposes of the morning line-up he stands tenth in a group of sixteen owner-drivers.

21. The seniority and rotation system were negotiated with Dufferin some years ago by a committee of the truckers. Although it was first formed to work out the loading arrangement, the committee has continued to represent other interests of the owner-drivers down through the years.

22. The committee consists of three owner-drivers who act as spokesmen for the entire group. Each year they negotiate with Dufferin the zone rates by which the owner-drivers are to be paid. In the normal course the committee puts to the respondent the truckers' collective demand for higher zone rates and comes back to the truckers with Dufferin's response. After discussion the truckers, as a group, then decide whether to accept what is offered; that is not usually done by a secret ballot or a show of hands but rather, as trucker Rupert Russell colourfully puts it, "by the noise".

23. The committee also acts on behalf of individual owner-drivers who may have a grievance with Dufferin. For example, when the quarry once proposed to sever its relationship with a trucker because of an accident on a delivery site, the committee interceded to have him reinstated subject to a two-day suspension.

24. It appears that suspensions are imposed at the instance of the committee as well as the instance of Dufferin. A seven-day suspension was once meted out to a trucker for littering the respondent's premises with oil cans. On another occasion the same driver received a half-day suspension for attempting to obtain a load without regard to the established seniority line. Another trucker received a one-day suspension at the request of the committee for having cut ahead of another trucker on a delivery site. And it is generally understood that an owner-driver who presents his truck for loading with an unclean box may be subject to a two or three day suspension. Thus, there is an elaborate unwritten code in the quarry enforced both by Dufferin and by the truckers themselves. Within that framework the committee acts not unlike a union with its own rules of conduct which are enforced with the cooperation of Dufferin. Each owner-driver can, in a meritorious case, count on the collective support of the truckers through their committee to shield him from any overly harsh discipline at the hands of the respondent.

25. When all of the above considerations are taken into account it appears to this Board difficult to reach any conclusion other than that the owner-drivers are in a relation of dependence upon the respondent which more closely approximates the relationship of employee to employer, than the relationship between two independent entrepreneurs. A number of factors support that conclusion. The longevity and constancy of the relationship between trucker and quarry are two obvious factors. Whatever options the truckers may have, the fact is that they haul, for all practical purposes, exclusively for Dufferin and that they do so over an extended period of years. The economic dependence of the owner-drivers on

hauling from the respondent's quarry is evidenced by the fact that some of them purchase their relationship with Dufferin at a substantial price when they also purchase their truck. They do not purchase their trucks before they have Dufferin's undertaking to provide them steady work. The fact that they sometimes require a letter from Dufferin when they purchase a truck to assure their source of financing that they will have a steady income is a further indication of dependence. Likewise, the fact that the sanction of suspension for one or more days may be imposed and have some financial meaning strongly suggests that the owner-drivers are in a position where they must depend on obtaining loads from Dufferin on a daily basis for their own financial security. The presence of a well-established and stringently enforced seniority system among the owner-drivers is another indication of the importance which they attribute to their on-going relationship with the respondent. And lastly, the presence of a powerful and effective committee of owner-drivers which is involved in the meting out of discipline, the give-and-take of bargaining on behalf of all of the truckers and the prosecution of grievances on behalf of individual owner-drivers is more suggestive of a collective employment relationship than of an association of independent contractors.

26. The Board therefore finds that the owner-drivers engaged in hauling aggregate material for the respondent from its quarry at Milton are dependent contractors within the meaning of section 1(1)(ga) of The Labour Relations Act and are therefore employees for the purposes of the Act.

27. We turn, lastly, to the respondent's request that the Board employ a 90-day/30-day formula to determine the list of employees for the purposes of this application. Five truckers worked on the application date, February 9, 1977. The employer has provided the Board with a list of some 66 truckers who did not deliver its materials on that date. The dates of their last day at work with the respondent vary widely: a number of them delivered the respondent's materials in the days and weeks immediately prior to the date of the application; a number of them did not work on the respondent's deliveries for as much as 11 months before the date of application. If the Board applies its normal rule and further includes as employees only truckers who worked within 30 days before the date of application and were expected to work within 30 days after that date, 20 of those 66 persons would be found to be employees for the purposes of the count. When those persons are added to the 5 persons at work on the date of application, the total number of employees for the purposes of the count would be 25.

28. If the Board were to apply the formula suggested by the respondent and include all persons who delivered materials within 90 days prior to the date of application and who were expected to perform deliveries within 30 days after that date, 31 of the 66 persons not at work on the date of application would be included in the list of employees for the purposes of the count. When the 5 employees that worked are added, the total count following that formula would be 36.

29. Any system devised to take account of some, but not all, absentee employees must necessarily be arbitrary. But in this case the marginal difference between a grouping of 25 and 36 employees for the purposes of the count is not sufficient to justify a departure from the Board's normal policy. Any number of formulae might be adopted for the purpose of determining the count of employees in different parts of the industrial employment sector. But the Board is of the opinion that until experience dictates otherwise the better course

is to adhere to the 30-day rule in bargaining units consisting of truckers employed by aggregate producers, subject to the application of the Board's normal policy in respect of a contemplated build-up of the employer's work force.

30. Where an enterprise employs persons on a fluctuating basis according to a regular cycle, the Board may defer consideration of an application for certification, or postpone the taking of a representation vote, if it is satisfied that the count of employees at the time of the application is not substantial enough to be representative of the number of persons ultimately to be employed. If, on the other hand the Board is satisfied that, notwithstanding a projected large increase in an employer's work force, a substantial and representative number of persons was nevertheless employed on the date of the making of the application, it will not defer consideration of the application before it or postpone the taking of a representation vote. (*Peter Austin Manufacturing Company*, [1967] OLRB Rep. May 144).

31. The sale and delivery of aggregate material will, in the normal course, fluctuate in tandem with the construction season. In applications of this kind, therefore, the Board must consider whether, having regard to the time that an application is made, the owner-drivers included in the count on the application of the 30-day rule constitute a substantial and representative number of persons in the employ of the respondent for the purposes of certification or whether a deferred representation vote should be ordered.

32. In the instant case the parties have not had the opportunity to make submissions to the Board in respect of an anticipated build-up of the work force. The Board shall therefore remain seized of this matter in order to allow the parties to make written or oral submissions in that regard.

33. The matter is referred to the Registrar.

992-71-R The General Contractors' Section of the Toronto Construction Association, (Applicant), v. Labourers' International Union of North America, Local 506, (Respondent), v. Erectors Division, **Ontario Precast Concrete Manufacturers' Association**, (Intervener #1), v. Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).

Accreditation – Reconsideration – Whether Board will reconsider order two years after its issue – Effect of applicant's failure to appear at earlier hearing

BEFORE: R.A. Furness, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES AT THE HEARING: Brian Foote and Ted Burrows for the applicant; A.M. Minsky for the respondent; no one for intervener #1; no one for intervener #2; Robin B. Cumine, Q.C. and James Valentine appearing for Valentine Enterprises Contracting.

DECISION OF THE BOARD: March 13, 1978.

1. This application for accreditation was filed on September 17, 1971.
2. In a decision dated February 18, 1975 the Board issued a certificate of accreditation to the applicant with respect to the following unit of employers:

all employers of employees for whom the Respondent has bargaining rights in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario in the Industrial, Commercial and Institutional Sector save and except Employers of employees employed in all phases of industrial plant maintenance and repair, Employers of employees employed as Journeymen Stone Cutters and Planermen working at or out of the Employers' premises and Employers of employees throughout the Province of Ontario:

- (a) in all phases of erection, installation and finishing of precast concrete products and other related components in the building and construction industry;
- (b) in all phases of insulation and waterproofing work with mastic, asphalt and other related products in the building and construction industry;
- (c) in all phases of drilling and saw-cutting of concrete, masonry or other similar substances or materials in the building and construction industry;
- (d) in all phases of post-tensioning and prestressing in the building and construction industry;
- (e) in the construction of railroad sidings and spur lines.

The name "Valentine Enterprises" appears on page 17 of that decision under the heading of Final Schedule "F". In the appendix to that decision in paragraph 12 on pages 15 and 26 the following determination appears:

12. The parties challenged the filings of the employers who claimed that the respondent had no bargaining rights and filed exhibits to support their challenges. Thus, the Board accepted the following:

1016 Valentine Enterprises is included in the unit of employees because of its certification with Toronto Building Trades Council, it will appear on Final Schedule F.

At this point it should be mentioned that "Final Schedule F" is a list of employers on behalf of whose employees the respondent is entitled to bargain as of the date of the filing of the application for accreditation but who have not had employees performing any work in the unit of employers referred to in paragraph 2 herein within the period of one year prior to the date of the making of the application.

3. In a letter dated October 28, 1977, counsel for Valentine Enterprises Contracting stated:

We are the solicitors for Valentine Enterprises Contracting, a limited partnership.

It has come to my client's attention that the assertion is being made that the accreditation order issued by the Board comprised of G.W. Reed, Q.C., E. Boyer, Esq., and F.W. Murray, Esq., as a result of their decision dated February 18, 1975 includes Valentine Enterprises Contracting or Valentine Enterprises in the unit of employers covered by the accreditation in favour of the Applicant.

We are writing to the Board at this time to request a reconsideration of the Board's decision in this matter insofar as it relates to any finding that Valentine Enterprises or Valentine Enterprises Contracting is an employer properly included in the unit of employers covered by the accreditation.

The essential reason for the request for reconsideration is that on our understanding of the facts the inclusion of our client in the unit of employers was done by the Board without jurisdiction, or alternatively on a misapprehension of the facts since our client was at no time a member of the Applicant nor had it given the Applicant any authority to bargain on its behalf and our client had at no time entered into a collective agreement with, been bound by a collective agreement with, been certified by or granted any voluntary recognition to, the Respondent, and the Respondent at no time had bargaining rights for any employees of our client.

While we do not have precise dates at this time, we have asked that the records of the Board be made available to us and will advise of the specific dates in question, but our information is that following the making of the application for accreditation in 1971 notice was given to our client *inter alia* of the application and our client filed a return setting out that the Respondent had no bargaining rights with respect to any of its employees. It is our information that this reply was filed in 1972.

There was a change in the identity of the actual persons managing the day to day operations of our client between 1972 and 1975, but it does not appear that our client took any further part or was involved in any further part of the accreditation proceedings from the filing of the reply in 1972 until at the very least it received or was deemed to receive a copy of the Board's decision of February 18, 1975.

That decision in one paragraph of its 27 pages states that:

"Valentine Enterprises is included in the unit of employers because of its certification with Toronto Building Trades Council, it will appear on final Schedule F."

Our client knows of no such certification and denies that any such certification in fact ever took place or that it at any time entered into a collective agreement with, or a voluntary recognition of, the Respondent. It would therefore appear that insofar as our client is concerned the Board's decision was based upon incorrect facts.

Notwithstanding the accreditation and the decision, our client was not contacted specifically by anyone claiming any rights arising by reason of the accreditation until it received notice of an application under Section 55 of the Act and grievances being brought before the Board pursuant to Section 112a of the Act (see Board Files Numbers 0842-77-R, 0974-77-M and 0961-77-M), and in fact has during the whole of the period in question operated under collective agreements between it and a council of trade unions which presently includes Teamsters Local Union 230 and Labourers' International Union of North America Local Union 183.

We would therefore ask that the Board reconsider its decision by removing our client from the unit of employers, and that the Board afford our client an opportunity of making representations before it in this regard.

We would perhaps add that we are filing this application at this time in compliance with an understanding given by the writer to the Board hearing the three above-mentioned applications and it may be that there are other facts and documents which will come to light in accordance with inquiries we have asked to be made both through the Board files and through our client's records, and we will of course advise the Board of this as expeditiously as possible.

4. The Board set this matter down for hearing. The reason for the hearing was stated to be for "the purpose of permitting Valentine Enterprises and/or Valentine Enterprises Contracting an opportunity to show cause why the Board should reconsider its decision dated February 18, 1975."

5. The application for accreditation was filed on September 17, 1971, and Valentine Enterprises was given notice pursuant to section 86 of the Board's Rules of Procedure. Section 86 requires the Registrar to serve such employers as the Board may direct with a notice of application and of hearing in Form 67. Form 67 provides in part:

TO:

(employer)

1. TAKE NOTICE that the applicant, on, made an application to the Ontario Labour Relations Board for accreditation as bargaining agent for employers whose employees are represented by the respondent, in the following unit of employers claimed by the applicant to be appropriate:

2. The application, reply, and interventions, if any, filed in this application

will be available for inspection at the offices of the Board, 400 University Ave., Toronto 2, Ontario, during business hours.

3. AND FURTHER TAKE NOTICE that on the basis of material now before the Ontario Labour Relations Board you may be found to be an employer in the unit of employers described above.

4. The EMPLOYER DATE fixed for this application as directed by the Board is the day of, 19.....

5. AND FURTHER TAKE NOTICE of the hearing of the application by the Board at its Board Room, 400 University Avenue, Toronto 2, Ontario onday, theday of 19..... ato'clock in thenoon.

6. THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

7. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

PART I

8. You will send to the Board your filing and a list arranged as in the Schedule accompanying Form 68, Employer Filing, Construction Industry, enclosed herewith, of all employees affected by the application (see note number 1 below) for the weekly payroll period immediately preceding the date of the making of the application, so that,

- (a) it is received by the Board not later than the employer date shown in paragraph 4; or
- (b) if mailed by registered mail addressed to the Board, at its office, 400 University Avenue, Toronto 2, it is mailed not later than the employer date shown in paragraph 4.

9. You shall verify the list of employees by adding thereto the following statement:

"This list has been prepared by me or under my instruction and I hereby confirm the accuracy thereof."

.....
Signature

WHERE AN EMPLOYER FILING INDICATES A DESIRE ON THE PART OF THE EMPLOYER TO MAKE REPRESENTATIONS TO THE BOARD WITH RESPECT TO THE APPLICATION, THE BOARD

MAY DISPOSE OF THE APPLICATION WITHOUT CONSIDERING
THE REPRESENTATIONS SET OUT IN THE EMPLOYER FILING
OF ANY EMPLOYER WHO FAILS TO APPEAR AT THE HEARING

6. Valentine Enterprises filed a Form 68, Employer Intervention, Application for Accreditation, Construction Industry, dated March 13, 1972. This form contains the following paragraph 6:

6. Submissions, if any, which the employer intervener desires to make at the hearing of this application:

Paragraph 6 of the Form 68 filed by Valentine Enterprises does not contain any submissions. A hearing of this application was held. Indeed a series of hearings and examinations by the Board's examiners were held. The attention of Valentine Enterprises was directed to the situation that on the basis of material before the Board *it might be found to be an employer in the unit of employers* (emphasis supplied by the Board). Valentine Enterprises was informed of the purpose of the hearing. In addition Valentine Enterprises was also informed that if it did not attend at the hearing the Board might proceed in its absence and it would not be entitled to any further notice and that where its filing indicated a desire on its part to make representations to the Board with respect to the application, the Board might dispose of the application *without considering the representations set out in its filing if it failed to appear at the hearing* (emphasis supplied by the Board). In fact, Valentine Enterprises, although it had notice of the hearing and the consequences of not attending, did not appear at the first hearing or any subsequent hearings.

7. Counsel for Valentine Enterprises argued that the Board was without jurisdiction to include his client on Schedule "F" since his client has never been a member of the applicant and had never given the applicant any authority to bargain on its behalf. In addition, counsel argued that Valentine Enterprises had never had any bargaining rights with respect to any of its employees with the respondent. Counsel referred to sections 113 and 106(c) of The Labour Relations Act.

8. The respondent opposed the request for reconsideration on the grounds that Valentine Enterprises was estopped from questioning the accreditation decision, that Valentine Enterprises did not have any evidence which was not available at the time of the original hearing and that Valentine Enterprises had been guilty of unreasonable delay in making its request for reconsideration.

9. The Board issued the certificate of accreditation in this matter some three years and five months after the date of filing. This delay was occasioned by the gigantic proportions of this application. More than one thousand employers were affected and the Board turned its mind to the factual and legal situation of each employer. The Board made its factual and legal determinations on the basis of the facts and arguments before it. Counsel for Valentine Enterprises argues that the Board is without jurisdiction to include his client within the terms of the accreditation order or alternatively that there has been a misapprehension of the facts. This argument ignores the fact that the Board has made a determination on the facts before it and has proceeded to determine that it had jurisdiction to include Valentine Enterprises within the terms of the certificate of accreditation. Valentine Enterprises was given notice of this application and was warned of the consequences of not at-

tending the hearing. Valentine Enterprises filed a reply in Form 68 and the Board acted upon the evidence before it with respect to this employer. In addition, Valentine Enterprises has not given any satisfactory reason for its failure to attend the initial hearing of this application. The fact that Valentine Enterprises has neither been a member of the applicant nor has authorized the applicant to represent it in bargaining does not in itself deprive the Board of the jurisdiction to determine that this employer is listed on Schedule "F". Section 106(c) and section 113 have, in our view, been considered in determining that Valentine Enterprises is an employer which was and is affected by this application for accreditation.

10. It appears to the Board that some two and a half years after the certificate of accreditation has been issued Valentine Enterprises is sufficiently bestirred to ask for reconsideration. Valentine Enterprises has had an opportunity to adduce evidence before the Board during the initial hearing. There is no suggestion that Valentine Enterprises now desires to adduce evidence that was not available at the time of the initial hearing and no explanation was given for the delay in asking for reconsideration.

11. Generally, the Board will not reconsider a decision where a party has not attended the original hearing. See the *Ken Bunyak's Bus Lines* case, [1974] OLRB Rep. 794. In addition, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive. See the *International Nickel Company of Canada Ltd.* case, [1963] OLRB Rep. 234; and the *Detroit River Construction* case, 62 CLLC ¶16,260. Valentine Enterprises has not succeeded in taking itself outside of these principles.

12. The Board proceeded very cautiously and very carefully after giving all interested parties an opportunity to be heard. The length and complexity of this application for accreditation require that the determinations of the Board be made with infinite care and it would take a far more compelling set of facts than exist herein before the Board would be prepared to permit an employer to adduce evidence in support of its request for reconsideration. As the Board stated in the *Canadian Union of General Employees* case, [1975] OLRB Rep. 320, 325:

One of the principal purposes of an administrative agency is to process the matters that come before it with expedition and economy. These values can only be achieved if there is finality to the Board's decision in the vast majority of cases.

To rehear an application for accreditation merely because one employer did not attend the original hearing – although warned of the consequences of not attending – would substantially impair this end.

13. The Board affirms its decision dated February 18, 1975, and dismisses the request of Valentine Enterprises that the Board reconsider its decision in so far as it relates to Valentine Enterprises.

1120-77-R Raymond Albert Lambert, (Applicant), v. Ottawa Newspaper Guild, Local 205, (Respondent), v. **The Journal Publishing Company of Ottawa, Limited**, (Intervener).

Termination – Evidence – Application made following a long and bitter labour dispute – Whether Board will permit respondent to lead evidence and conduct extensive cross examination concerning the dispute in order to establish the climate in which the termination application originated – Whether evidence relevant

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *J. Ronald Scott for the applicant; Michael Mitchell, Katie Fitzrandolph and Jim McCarthy for the respondent; Harvey Beresford and L.A. Lalonde for the intervener.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL; March 7, 1978.

1. This is an application made under Section 49 of the Act for a declaration from the Board terminating the bargaining rights of the respondent trade union. In such cases the Board is required by section 49(3) of the Act to ascertain whether “not less than forty-five per cent of the employees in the bargaining unit have *voluntarily* signified in writing that they no longer wish to be represented by a trade union.”

2. At a hearing held on January 31, 1978 the Board heard evidence from Mr. Raymond Albert Lambert as to the circumstances surrounding the origination, preparation and circulation of the written statement of employee wishes filed in support of the application. After extensive cross-examination concerning preparation and circulation of the statement, counsel for the respondent began to cross-examine Mr. Lambert on matters having to do with the bitter labour dispute between the respondent union and the intervener company which preceded the application and which was continuing as of January 31. The Board voiced its concern as to the relevance of this evidence. Counsel for the respondent union informed the Board that it was his intention to conduct an extensive cross-examination of Mr. Lambert on matters relating to the labour dispute, and to call evidence of his own in this regard. The Board, therefore, instructed counsel for the union to set out in writing both the material facts upon which he intended to rely, and his representations as to the relevance of those facts to the “voluntariness” of the statement of desire.

3. Counsel for the respondent complied with the Board’s request by letter dated February 8, 1978. Counsel referred to Board cases wherein the Board, having regard to the responsive nature of the employer-employee relationship (see re *Pigott Motors (1961) Ltd.* [1962] 63 CLLC 16,264), has found that the overall environment of the workplace and the cumulative impact of events have thwarted free expression of the employees’ views. Those cases involved situations where an employee could reasonably assume that management was involved in the circulation of the petition and would become aware of who signed and who did not. In such circumstances the Board has found the petition not to be a voluntary expression. (See re *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813 and the cases cited therein, *Northwest Excavating Limited*, Board File No. 1171-76-R, decision dated November 24, 1976). Counsel for the union stated:

“Pursuant to this established line of the board’s jurisprudence, the respondent is seeking in cross-examination and in chief to show that the employees who signed the document might logically have assumed that management supported the petition and would find out who signed or refused to sign it. The union is seeking to present evidence that will show how in the overall environment of this work place, it was impossible given the circumstances surrounding the labour dispute, for there to have been a truly voluntary expression of employees.”

4. The material facts which counsel for the respondent union refers to in his letter of February 8, 1978 as supporting his argument can be summarized as follows:

(1) The termination application was filed during the course of a protracted and bitter labour dispute between the respondent union and the intervener company.

(2) All of the employees in the circulation department, along with other employees who belonged to other unions who were employed as of October 26, 1976 were locked out by the employer on that date and replaced by the petitioners.

(3) Those persons hired as replacement labour have never been represented by the union and have never worked under the expired collective agreement. It is these persons who are coming to the Board to say they do not wish to be represented by the union.

(4) A principal issue at the bargaining table concerned the impact of technological change in the circulation department. Virtually all of the union’s alleged wrongdoing set out in the news stories and the publisher’s statements concerned the circulation department. The employer made direct accusations of wrongdoing in respect of certain circulation employees who had been locked out.

(5) Within the context of this bitter labour dispute persons such as the applicant were hired to deliver newspapers and keep the enterprise going.

(6) During the course of the labour dispute the Journal expressed its concern in the press and in the sessions with the Industrial Inquiry Commissioner that its very existence was threatened by the union.

(7) The union attempted to persuade customers not to purchase the newspaper or advertise in it. In contrast, the task of the publisher was to maintain and encourage circulation.

(8) In order to carry on the successful publication and circulation of its newspaper, the Journal encouraged and supported those hired after October 26, 1976.

5. Counsel for the respondent concluded his written representations as follows:

“It is submitted that in this environment of bitter struggle where the two sides were locked in confrontation it is impossible, on the facts, to speak of a ‘voluntary’ expression of the ‘loyal’ employees to free themselves from the union. To the contrary, given the circumstances, the petitioners not only might have logically assumed, but must have logically

assumed, that management supported the petition to bust the union. The Journal had made it clear by its words and conduct that it did not want the union as the bargaining agent for the employees. Given the circumstances of the Journal's fight for survival the petitioners must surely have assumed that if someone refused to sign against the union, management would learn of it. After all, if the Journal was fighting for its very survival how could one serve the Journal and not be anti-union."

6. In deciding upon the voluntariness of statements of desire the Board is guided by the evidence pertaining to the circumstances surrounding its origination, preparation and circulation. If a petition has been circulated in a manner which would reasonably cause an employee to conclude that management was involved, and would become aware of who signed it and who did not the Board has generally been unable to find that the statement was voluntary. The *Morgan Adhesives* case (supra) which is relied on by the respondent is a case in point. In that case the Board heard evidence that: those who circulated a statement in opposition to the union's application for certification did so on company premises and during working hours; that they made no effort to hide the petition; that they solicited signatures away from their work stations; that supervisors made no effort to impede the signing process; and that a meeting had been held between company officials and those who circulated the document in opposition to the certification the same day as notice of the union's application was posted. Although there was no evidence directly linking the company to the circulation of the statement in opposition to the union, the Board found that the employees who signed might reasonably have suspected management involvement and concluded that the company would know who signed and who did not.

7. Counsel for the respondent asks the Board to draw the inference that because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances not directly related to the origination, preparation and circulation of the statement. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely – and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 complaints brought by the parties – the Board would not be prepared to draw the inference which the respondent suggests.

8. In the first place the facts in this case must be viewed in the context of an application for *termination* of bargaining rights where there has been no sudden "change of heart" to raise the suspicion of the Board. In *N.J. Spivak Limited* case, [1977] OLRB Rep. July 462 at para. 6 the Board observed:

"In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an

employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inference adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act."

It should be noted that section 53(3) of the Act expressly contemplates the making of a termination application after 6 months have elapsed from the commencement of a lawful strike. It is evident, therefore, that the existence of a protracted labour dispute is not, in itself, sufficient to justify a finding that the application is not voluntary. Indeed, in the circumstances of a termination application filed by replacement employees who have crossed union picket lines to perform their duties, it is not unreasonable to infer that these persons are, of their own volition, unsympathetic to the union cause and have been since the commencement of their employment. The facts upon which the respondent seeks to rely are as supportive of the inference that the replacement employees moved to terminate the union's bargaining rights of their own volition and in their own self-interest (i.e. in order to preserve their employment), as they are of any other reason for their making the application and signing the statement.

9. Replacement employees are employees within the meaning of the Act and are entitled to exercise their rights under Section 49 of the Act. The inference which the respondent union asks the Board to draw from the facts upon which it intends to rely would undermine the rights of replacement employees under Section 49 of the Act – not on the basis of management interference in the application nor on the basis of a climate surrounding the circulation of the statement of desire which would cause those signing the statement to reasonably conclude that the company was involved and would come to know who signed the statement of desire, but rather, on the basis of there being a protracted dispute between the company and the union during the course of which the applicants were hired to provide replacement labour. The Board is not prepared to conclude that a statement of desire submitted by a replacement employee hired during the course of a bitter or protracted labour dispute and signed by other replacement employees, is, on its face, a document which does not express the true wishes of those who have signed.

10. The facts upon which the respondent union intends to rely support the inference that the employees might reasonably have concluded that the company would welcome the termination application. These facts, however, even if proven, do not support the inference that the company was involved, directly or indirectly, in the origination, preparation, or circulation of the statement of desire nor do they support the inference that the employees who signed the statement might reasonably have concluded that the company was involved and would become aware of those who signed and those who did not. It is these latter inferences which the Board must draw if it is to make a finding that the statement of desire is not a voluntary expression. The facts upon which the respondent seeks to rely do not establish direct or indirect employer involvement in the application for termination, nor do they allow the Board to infer that those who signed the statement did so because they reasonably perceived that the company was involved in the making of the application and would come to know who signed the statement in support of it. In the result the Board must find that the facts upon which the respondent seeks to rely are not relevant to the Board's determination of voluntariness.

DECISION OF BOARD MEMBER O. HODGES:

Having already decided that Mr. Lambert has no status to bring the petition as an "employee" within the meaning of section 49(3), and further that the signatories thereto may not be counted as "employees" within the meaning of section 49(3), I am constrained to find that such further evidence as the respondent union can adduce with regard to voluntariness should be heard by the Board.

1120-77-R Raymond Albert Lambert, (Applicant), v. Ottawa Newspaper Guild, Local 205, (Respondent), v. **The Journal Publishing Company of Ottawa, Limited**, (Intervener).

Reconsideration – Termination – Evidence – Whether Board should consider evidence of bitter labour dispute – Whether relevant to origination of termination application.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *J.R. Scott for the applicant; C.M. Mitchell for the respondent; H. Beresford for the intervener.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL; March 28, 1978

1. This is an application made under section 49 of the Act for a declaration from the Board terminating the bargaining rights of the respondent trade union. Under section 49 of the Act the Board must decide if not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the trade union.

2. In a majority decision dated March 7, 1978 the Board found that the material facts set out in the respondent's letter of February 8, 1978 are not relevant to the determination of voluntariness and accordingly, refused to hear evidence in respect to these facts. At the continuation of this matter on March 9, counsel for the respondent asked the Board to exercise its authority under section 95(1) and reconsider its decision. Counsel for the respondent argued that this Board and the Canada Labour Board have entertained evidence of the type precluded by the majority in this case. He referred the Board to *re Artistic Woodwork*, [1975] OLRB Rep. Sept. 691 and to *re CJRB Radio Provinciale Limitée*, [1978] CLRB Di 19 – 140. He argued that the facts upon which he seeks to rely when considered in conjunction with the other evidence before the Board, would, if proven, be relevant to the determination of voluntariness.

3. The Board has reviewed the facts set out in the respondent's letter of February 8, 1978 and has determined that it should not reconsider its decision of March 7, 1978. The facts upon which the respondent seeks to rely do not of themselves, or in conjunction with

the other evidence, assist the Board in deciding if the statement of desire is a voluntary expression of those who signed it. All of the evidence going to voluntariness was before the Board at the time it made its decision of March 7th. The Board decided at that time that the evidence which the respondent sought to adduce was not relevant and has not been persuaded that its initial decision is incorrect.

4. The Board does not read either the *Artistic Woodwork Co.* decision, (supra), or the *CJRB Radio Provinciale Limitée* decision, (supra), as standing for the proposition that evidence of the climate generated by a protracted labour dispute is necessarily relevant to a determination of whether a statement filed in support of a termination application is a voluntary expression. In neither of these cases was evidence of this type relied upon. In the *Artistic* case the Board stated that the evidence went to "... the manner in which the documentary evidence in support of the application was originated and signed." In that case the finding of the Board was that there had been no "direct or indirect pressure from management on employees in the bargaining unit to sign the petitions." The *CJRB* case (supra) is one in which those seeking to terminate bargaining rights alleged not only that the union no longer enjoyed majority support, but also that it "never made a reasonable effort to negotiate a collective agreement." The Canada Labour Board heard unrefuted evidence that an official of the company met with some employees "to impress upon them that it was in their interest to resign immediately from the union." In addition, the Board in that case heard evidence of tacit management approval of the circulation of the statement which was done in the station during working hours. It was on the basis of this evidence and also the failure of the applicant to meet its onus of satisfying the Board as to the circumstances surrounding the origination of the statement which led the Board to find that the statement did not represent the true wishes of those who signed it.

5. Having regard to the foregoing the Board hereby dismisses the respondent's request for reconsideration. This application was filed on October 13, 1977. The respondent should not be allowed to adduce evidence which is not relevant to the issue before the Board and to thereby further prolong the proceedings and delay the taking of a representation vote to which the employees might otherwise be entitled.

6. Mr. Raymond Albert Lambert gave first-hand evidence of the circumstances surrounding the origination, preparation and circulation of the statement of desire filed in support of the application. The Board is satisfied on the basis of his evidence that there was no direct or indirect employer involvement in the filing of the application or in the origination, preparation or circulation of the statement in support of the application. The Board is further satisfied that the statement was not circulated in such a manner as to cause those who signed it to reasonably conclude that management was involved and would know who signed and who did not. Mr. Lambert testified that the application was filed in order to safeguard the employment of the replacement employees and in the circumstances the Board is not prepared to characterize his remarks to other employees that they would lose their jobs if the union returned as intimidation or coercion. It is common knowledge that in the normal course replacement employees are terminated upon settlement of the labour dispute which has resulted in their employment. The fact that this particular labour dispute was a long and bitter one, cannot diminish the weight of Mr. Lambert's uncontradicted evidence and thereby cast doubt upon the voluntariness of the statement filed in support of the application. The Board is satisfied on the evidence before it that the statement represents the true wishes of those who signed it.

7. It remains for the Board to determine if not less than forty-five per cent of the employees in the bargaining unit have affixed their signatures to the statement of desire which the Board has found to be a voluntary expression of those who signed it. The bargaining unit in the instant case excludes from its scope "temporary employees employed on a special project for a limited time." The respondent takes the position that the replacement employees fall within this exclusion and are, therefore, beyond the scope of the bargaining unit. If the Board accepts the respondent's argument it must find that less than forty-five per cent of the employees in the bargaining unit signed the statement of desire and dismiss the application.

8. The Board, therefore, directs the Registrar to put this matter on for continuation for the purpose of hearing evidence and argument in respect of whether any or all of the replacement employees are excluded from the scope of the bargaining unit.

DECISION OF BOARD MEMBER O. HODGES:

Herein are my reasons for dissenting from the decision of the majority in this matter dated December 2, 1977.

1. Section 49(2) bars this application because the applicant, Raymond Albert Lambert, is not an "employee", in my opinion.

S. 49(2): Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

2. The definition of "employees" must be found in the most recent collective agreement. That the agreement was terminated by a lawful strike or lockout is not material to the basis for finding the definition of "employees". There is nowhere else to find the words.

3. A person hired to replace an employee on strike or an employee locked out cannot, in my view, be deemed to be an "employee" for the purpose of bringing an application under s. 49(2). The status to bring that application may be found only in an employee who was in the service of the employer *prior* to strike or lockout, and working under the terms of a collective agreement.

4. The collective agreement in this case covered all employees in a bargaining unit defined in Article 1(a).

1. COVERAGE

(a) This agreement shall extend to and cover by its provisions all employees in the Circulation Department of the Publisher save and except the Circulation Manager, Assistant Circulation Manager, secretary to the Circulation Manager, employees hired to work regularly for 24 hours or less per week, temporary employees employed on a special project for a limited time, or a student employed during his school vacation. The duration of employment in a calendar year for any one temporary employee shall not exceed a total of five months.

A person hired to replace any of those employees defined in this bargaining unit who were on strike or are locked out, may not be deemed to have the status of an employee, for the purpose of bringing the instant application. Mr. Lambert, the applicant was hired to replace an employee absent as a result of the strike and/or lockout, and is therefore without status to bring this application for termination before the Board.

5. The collective agreement, the basis for the definition of "employee", established in Article 2, that Guild Membership is a prerequisite to achieving status as an employee:

Article 2. GUILD MEMBERSHIP

(a) All employees who on the date of signing of this Agreement are members of the Guild in good standing in accordance with its Constitution and By-Laws and all employees hired after the date of signing of this Agreement shall, as a condition of employment be members of the Guild and maintain their membership in good standing, in accordance with its Constitution and By-Laws as provided in (c) of this Article. An employee dismissed under this Article shall not receive severance pay.

(b) The Guild will admit to membership any employee, subject to the Constitution of the Newspaper Guild and the By-Laws of the Guild.

(c) Except, as hereinbefore provided, employees entering the service of the Publisher after the date of the signing of this Agreement shall become members of the Guild within thirty days of the date of employment.

Thus, employees in the service of the employer prior to the strike and/or lockout, who did not join the union subsequent to the signing of the collective agreement, an option provided by Article 2(a), or who had not become members under the thirty day option provided by Article 2(c), are also barred from participation as "employees" in the bringing of this application.

6. It is my opinion that only those in the service of the employer prior to the strike and/or lockout, and who were members of the Guild, have the necessary status within the meaning of section 49(2) to bring the instant application, or to be counted as proper signatories to the application for the purpose of ascertaining the requisite 45 per cent of the employees, as required by s. 49(3) of the Act.

7. It follows from the foregoing that I would grant the respondent trade union the opportunity to adduce all of its evidence. Since it was my decision to hear the evidence which is the subject of the request for reconsideration, it is unnecessary for me to say more than that I would have granted the request for reconsideration.

1232-77-R The Association of Professional Student Services Personnel,
(Applicant), v. **The Halton Board of Education**, (Respondent).

Employee – Whether psychologists employed by school board are managerial

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members M.J. Fenwick and F.W. Murray.

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER F.W. MURRAY; March 29, 1978.

1. In a decision dated December 2, 1977 the Board certified the applicant under the provisions of Section 6(1a) of the Act pending the Board's ultimate determination as to the employee status of those in the classification psychologist. The applicant takes the position that these persons are employees within the meaning of the Act who should not be excluded from the otherwise agreed bargaining unit as described at para. 2 of the Board's December 2nd decision. The respondent, on the other hand, argues that the psychologist exercises managerial authority and should be excluded from the bargaining unit. The Board appointed a Labour Relations Officer to meet with the parties and inquire into the duties and responsibilities of those in the classification psychologist. The Board is in receipt of his report which is dated February 8, 1978. Neither party desires a further hearing and accordingly, the Board is empowered to determine the employee status of those in the classification psychologist on the basis of the information as set out in the report of the Labour Relations Officer and the written representations of the parties in respect thereof.

2. Section 1(3)(b) of the Act states:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

The purpose of the section, simply put, is to preserve the integrity of the collective bargaining process by excluding from the operation of the Act persons who, because of the nature of their duties and responsibilities, would find themselves in a conflict of interest if found to be employees within the meaning of the Act. The Act does not contain a statutory definition of the term “managerial functions” and hence the Board is free to apply the section having regard to the particular work setting.

3. In the instant case the Board is dealing with a group of professionals and must be careful not to confuse professional responsibility and competence with managerial function. Mr. George Luce, the individual chosen as representative of those in the classification, holds a masters degree in psychology and is a registered psychologist. He works with a group of psychometricians and teacher diagnosticians in the Department of Psychological Services at the Halton Board of Education and is on call to either the individual schools or to the psychometricians and teacher diagnosticians. The psychologist is the most qualified member of the team, as evidenced by both his formal qualifications and salary. He oversees and pro-

vides professional advice and consultation to the other members of the team. This function, however, when considered by itself, must be characterized as an exercise of professional skill and responsibility and not as a manifestation of managerial authority.

4. The evidence establishes, however, that the responsibilities of the psychologist in the respondent's organization extend beyond the delivery of professional service to the client group. The evidence establishes that the psychologist has taken part in the hiring process to the extent of being present at the hiring interview and expressing opinions on whether the prospective employee has training and experience appropriate for the position. Further, the psychologist takes part in the annual evaluation of other employees. Mr. Luce testified that his role in the evaluation process "is to act as an advocate for the individual who is being evaluated to elaborate on their performance from a professional and technical point of view if these questions came up." Although the area superintendent is responsible for the evaluation and assessment of employees the evidence establishes that the psychologist plays an important role in this process. The evidence establishes that he is expected to express his opinion as to the performance and "effectiveness" of the psychometricians and teacher diagnosticians who are employees within the bargaining unit. Although Mr. Luce used the term "advocate" to describe his role in the evaluation process it follows from the nature of his involvement that there will be occasions when his subjective assessment is critical. The psychologist has also been asked to give his opinion as to whether a particular employee should be transferred.

5. Having reviewed the evidence the Board is satisfied that those in the classification psychologist would find themselves in a conflict of interest if permitted to bargain collectively with other employees. The Board has come to this conclusion having regard to the role of the psychologist in the hiring and evaluating of other employees who fall within the bargaining unit. This function goes beyond the delivery of professional services to the client groups. The Board is of a mind that the subjective assessments which are required of the psychologist in regard to the hiring and evaluation of bargaining unit employees constitute managerial function within the meaning of Section 1(3)(b) of the Act. The Board, therefore, finds those in the classification psychologist not to be employees for purposes of the Labour Relations Act.

6. Accordingly, the Board hereby certifies the applicant as the bargaining agent for all psychometricians, social workers, attendance counsellors and child care workers in the employ of the respondent in the Regional Municipality of Halton save and except supervisors, persons above the rank of supervisor, psychologists and persons regularly employed for not more than twenty-four (24) hours per week.

7. A formal certificate will now issue to the applicant.

DECISION OF BOARD MEMBER M.J. FENWICK:

1. There is no dispute as to the facts in this case. However, I dissent from the decision of the majority that the psychologists in question exercise managerial functions within the meaning of section 1(3)(b) of the Labour Relations Act and are therefore excluded from the bargaining unit.

2. I agree with the applicant union's position that they do not perform managerial functions within the meaning of the section.

3. My decision is basically founded on two conclusions that I have reached on the evidence. First, any authority or decision making power exercised by the persons in question relate to their professional skill rather than to matters on a managerial nature. Second, even if they perform some managerial functions it is only incidental to their primary professional functions which are clearly of a non-managerial nature.
4. The Board has in the past held that while the criteria applied to determine whether professional persons exercise managerial functions are basically the same as with other persons, in applying those criteria a distinction must be made between functions of a managerial nature and functions which are inherent in the exercise of such persons' professional skills (*Essex Health Association*, O.L.R.B. Rep. (1970) Nov. p. 824). It is my conclusion that the psychologists' participation in "managerial" like functions, including sitting on a hiring committee and participation at evaluation meetings, were functions solely related to their professional competence. Although such functions are usually "managerial", the psychologists were present not to exercise any managerial authority, but merely to assist the manager in clarifying the technical aspects involved in the situation. I doubt if it can be suggested that such participation makes a professional person "a manager". In fact, this Board has found professional persons to be not managers in situations where on the face of it they seemed to exercise even more managerial authority than the psychologists in this case. (See *Ajax and Pickering General Hospital* O.L.R.B. Rep. (1970) Feb. p. 1284).
5. In *Hydro-Electric Power Commissioner of Ontario* O.L.R.B. Rep. (1969) Aug. p. 669 at 671, the Board stated, "unless a person who performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions, which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining." From the evidence there is no doubt that the psychologists had no discretion as to hiring or evaluation. It is equally clear that their opinions were very much subject to the discretion of higher management. Apart from commenting on the professional aspects if called upon to do so, they had no input towards the final decisions, which were taken exclusively by higher management.
6. On the other hand, the negative evidence should not be ignored. The psychologists do not participate in functions which are traditionally taken to be the hallmarks of managerial status. Thus they played no role in discipline, grievances, lay-off, place of work and hours of work. They were not involved in the formulation of any budget. They were not authorized to allow time off for other employees. They were specifically instructed that merit increases for employees were not their concern.
7. Even if it is conceded that the psychologists had some supervisory role, it is my conclusion that it is only incidental to the bargaining unit work which occupied the great majority of their time. Therefore, applying the well established "prime function" test laid down in *Falconbridge Nickel Mines Ltd.* O.L.R.B. Rep. (1966) Sep. p. 379, they should not be excluded from collective bargaining. Just as much as the fact that management consults a trusted senior employee regarding the work aptitude of other employees or job applicants does not make him a manager, the fact that a professional person is consulted in the same circumstances does not make the professional person a manager.
8. One concern the Board has in considering the exclusion of "managers" is the pos-

sibility of conflict of interest. However, since the psychologists have no discretionary decision making power, or the power to make specific recommendations affecting other employees, such a concern should not exist in this case. It is clear from the evidence that the psychologists were not treated as "bosses" by the unit employees. Rather, because of their higher qualifications and skill they sought advice and guidance whenever any problem arose. The evidence was that the employees expected that any discussions they have with the psychologists regarding their work will be kept confidential.

9. In the circumstances, I would have found that the persons in question did not exercise managerial functions within the meaning of section 1(3) (b) of the Labour Relations Act and that they should be included in the bargaining unit applied for by the applicant.

1683-77-R; 1709-77-U; 1770-77-U; 1771-77-U United Steelworkers of America, (Applicant), v. **Trent Metals Ltd.**, (Respondent), v. Group of Employees, (Objectors).

Practice – Procedure – Whether applicant seeking certification pursuant to section 7a must give particulars of misconduct to be alleged

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and C.G. Bourne.

APPEARANCES: *B. Chercover and Grant Taylor for the applicant/complainant; Joseph Carrier and Roy Murduff for the respondent; W.J. Hemmerick, Q.C. for the objectors.*

DECISION OF THE BOARD; March 29, 1978.

1. The Board directs that the above application and complaints be and the same are hereby consolidated.
2. In respect of the section 79 complaints the respondent takes the position that the parties have entered into a signed settlement of all matters arising out of these complaints. The applicant, on the other hand, argues that the purported settlement relied upon by the respondent does not constitute a settlement within the meaning of Section 79(6) of the Act and should not, therefore, serve as a bar to a hearing on the merits of the Section 79 complaints. Notwithstanding the purported settlement, both counsel expressed hope that these matters could be resolved. Accordingly, the Board did not rule on the status of the purported settlement but rather remained seized and confirmed the right of the respondent to argue at any subsequent hearing that the purported settlement constitutes a settlement within the meaning of section 79(6) of the Act.
3. Turning to the certification application. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties the Board further finds that all em-

employees of the respondent at Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and persons engaged as trainees under the Canada Manpower Industrial Training Program, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The union challenged the employee schedules submitted by the employer and accordingly, the Board directed the union to meet with the employer and the Labour Relations Officer and review the schedules. The following employees, all of whom appear on Schedule A, have been challenged by the union.

- (i) David Gibbs
- (ii) Cindy Locke
- (iii) Cleworth Scriver
- (iv) Ethel Thompson
- (v) Fred Williams
- (vi) Ed Zielski

These challenges, however, cannot affect the finding of the Board with respect to the membership position of the applicant. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 20, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The parties are in agreement that if the Board orders a vote, which is contingent upon its disposition of the union's request that the Board certify without a vote under the provisions of Section 7a, the six persons listed above should be allowed to vote if they so desire. The parties are also in agreement that their ballots should be segregated, and any representations the parties wish to make with respect to their entitlement to vote be reserved pending further discussion between the parties.

6. At the hearing in this matter the union asked the Board to proceed under Section 7a of the Act and certify without a vote. Counsel for the employer argued that the union had ample opportunity to raise the 7a matter and that the Board should find the union's request to be untimely. Counsel for the applicant union argued at the March 2nd hearing that he had only become aware of certain facts material to the Section 7a request that morning. He admitted that these facts related to the actions of certain management persons on or about January 30, 1978. It is the intention of the applicant to rely upon this alleged misconduct of the employer which occurred on or about January 30, 1978 and in addition to rely upon both the particulars filed in support of the section 79 complaints and the particulars filed by letter dated February 24, 1978 with respect to the union's contention that the petition filed in opposition to the application does not represent a voluntary expression of those who signed it. These latter particulars were before the Board and the parties as of the March 2nd hearing.

7. The Board is of the view that Rule 47 applies in the case of an application under section 7a of the Act. It is incumbent upon a union to file a concise statement of the material facts upon which it intends to rely in support of a section 7a application and to do so promptly upon discovering the alleged improper or irregular conduct. Indeed, it is unlikely that a union would not be immediately aware of employer misconduct which would support a section 7a application. The Board is satisfied that in this case the material facts cited in support of the section 79 complaints and in the applicant's letter of February 24, 1978, were filed in a timely fashion. It cannot be argued that the respondent is caught by surprise because the union now seeks to rely upon these facts in support of its request that the Board apply Section 7a of the Act.

8. The difficulty in the instant case lies with the attempt by the union to rely, in part, upon alleged misconduct of the company which occurred on or about January 30, 1978, some 4 weeks before the hearing which took place on March 2nd and the failure of the union to have particularized the alleged misconduct prior to the hearing. If these were the only facts upon which the union sought to rely the Board would be compelled to find that the union's allegations of employer misconduct on January 30th had not been particularized prior to the hearing when, with due diligence they could have been. In such circumstances the Board would have either refused to hear the matter or have adjourned upon terms satisfactory to the respondent. In the instant case, however, a number of the material facts upon which the union seeks to rely in support of its request under Section 7a were filed in a timely fashion and could have been adduced in evidence at the hearing on March 2nd without prejudice to the respondent. Similarly, in view of the adjournment of these proceedings from March 2nd to a date to be fixed by the Registrar, the respondent will not be prejudiced by the admission of evidence going to the alleged misconduct which occurred on or about January 30, 1978, allegations which have now been particularized by the applicant in a letter dated March 9, 1978. In the result it is the decision of the Board to allow the applicant to proceed with its section 7a application in respect of those material facts which are set out in support of its section 79 complaints which are set out in its letter of February 24, 1978 and which are set out in its subsequent letter of March 9, 1978.

9. This matter is hereby referred to the Registrar.

2138-76-M Ontario Allied Construction Trades Council, (Applicant), v. The Electrical Power Systems Construction Association and **Ontario Hydro**, (Respondents).

Arbitration – Practice – Procedure – Collective agreement between association of construction employers and council of trade unions – allegation of breach of collective agreement by one employer – status of that employer in section 112a arbitration proceedings

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *R. Koskie for the applicant; R. Dunsmore and B. O'Neill for the respondent.*

DECISION OF THE BOARD; March 14, 1978.

1. This is a referral to arbitration of an application filed under section 112a of The Labour Relations Act.
2. The grievance alleges that Ontario Hydro has breached the wage rate provisions of a collective agreement between the applicant and The Electrical Power Systems Construction Association (EPSCA) dated August 28, 1974, (hereinafter referred to as the master EPSCA agreement).
3. A preliminary objection with respect to the status of parties was raised by counsel for Ontario Hydro. He submitted that Ontario Hydro should not be a party to these proceedings inasmuch as the two parties to the collective agreement are the applicant and EPSCA. That those two bodies are the parties to the collective agreement within the meaning of section 112a was determined by this Board in *The Electrical Power Systems Construction Association* [1976] OLRB Rep. Dec. 825. The issue is whether they may be the only two parties to an arbitration in respect of that collective agreement.
4. EPSCA is an association of companies engaged in the construction of facilities for the generating and transmission of electrical energy. It acts as bargaining agent for all of its members in respect of a bargaining unit of their employees engaged in construction projects for Ontario Hydro. Ontario Hydro performs certain construction work in its own right and as such is a member of EPSCA. It is not disputed that Ontario Hydro is bound by the collective agreement that is the subject of this grievance. Nor can it be doubted that Ontario Hydro has an interest in these proceedings to the extent that it would be the subject of a Board order in the event that the grievance were successful.
5. Section 5 of *The Statutory Powers Procedure Act*, S.O. 1971 c.47, provides:
 5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

By the operation of that section a tribunal must first have recourse to the statute governing its proceedings to determine whether the parties to the proceedings before it have been statutorily defined.
6. These proceedings are under section 112a of The Labour Relations Act, and while that section provides that a party applicant must be a party to the collective agreement it is silent as to who may be a party respondent or an intervener. The question then becomes who would be "persons entitled by law to be parties to the proceedings", as provided by The Statutory Powers Procedure Act. In other words who, according to the common law of natural justice, should be given notice and afforded an opportunity to participate in the proceedings?
7. We have no doubt that Ontario Hydro must be a party in that sense. It is well settled that a person whose interests may be directly and adversely affected by an adjudication in respect of a collective agreement is a proper party to those proceedings notwithstanding that he may not, strictly speaking, be one of the two parties to the collective agreement. In that circumstance a board of arbitration has a duty to give notice of its proceedings to the person or company in question and to afford them a full opportunity to

participate. (*Re Bradley and Ottawa Professional Fire Fighters Ass'n* (1967) 63 DLR (2d) 376 (Ont. C.A.), *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co.* (1968) 65 DLR (2d) 641 (S.C.C.).) Thus the parties to a collective agreement and the parties to proceedings relating to that agreement need not always be one and the same. And that is so no less under section 112a of The Labour Relations Act than in other arbitration proceedings.

8. A party which has received notice of an application and of the Board's hearing in respect of it is not, of course, required to appear and take part in the hearing. But its decision not to appear does nothing to alter its status as a party, save that it may be foreclosed from intervening at a late stage of the proceedings (e.g. *York University* [1967] OLRB Rep. Apr. 187). That is reflected in the definition of "party" in section 1(1)(b) of the Board's Rules of Procedure whereby it is provided that "party" includes each person served with notice of an application or complaint regardless of whether they choose to appear.

9. In the instant case Ontario Hydro is the specific employer member of EPSCA which is alleged to have breached the collective agreement. It has particular knowledge of the events alleged and must be directly and substantially affected by any order of this Board disposing of the grievance. And it has had notice of this application. Having regard to those facts, to the established rules of natural justice as reflected in the above decisions and to the Board's own Rules of Procedure, we find that Ontario Hydro, no less than EPSCA, is a proper party respondent in these proceedings.

10. The grievance that is the subject of this arbitration alleges that since August 30, 1976, employees of Ontario Hydro working on the back end of air trac drills engaged in work at the site of the "Bruce B" nuclear generating station have not been paid according to the applicable wage rate. The employees in question are labourers and their wage rates are determined by a schedule to the Labourers International Union of North America's appendix to the master EPSCA agreement. Article 1.1 of the Labourers' appendix provides that a number of classifications of labourers are covered by it, among them "Air Tool Operator", "Air Trac Driller" and "Air Trac Driller Helper".

11. The wage schedule provides a number of wage rates for various classifications which appear in Article 1.1 of the appendix, but not for all of those classifications. It also provides a base wage rate for labourers. It further contains wage rates for job descriptions which are not included in the classifications found in Article 1.1 of the appendix. It provides specific wage rates for air trac drillers and for air tool operators. No specific wage rate is provided for air trac driller helpers, and that gives rise to the dispute in these proceedings.

12. The union maintains that because the air trac drill is air-powered it is an air tool and that persons who work on an air trac drill in conjunction with the air trac driller are "air tool operators" within the meaning of the wage schedule and should be remunerated accordingly. That is to say they should receive an increment of 43¢ per hour above the base rate for labourers. The union makes the alternative submission that even if the employees in question are not "air tool operators" they should nevertheless be paid at the same rate as is provided for the classification. The employer has paid the man on the back end of the air trac drill at the base rate, maintaining that he is an air trac driller helper within the meaning of that term in Article 1.1 and that since no separate wage rate has been negotiated for that category, remuneration should be at the base rate for labourers.

13. In our view the collective agreement is clear on its face. When Article 1.1 and the wage schedule are taken together, “air trac driller helper” and “air tool operator” are separate classifications and a special wage rate is provided for the second and not for the first.

14. The Board permitted the union to adduce considerable extrinsic evidence to disclose a latent ambiguity in the collective agreement and to resolve that alleged ambiguity by showing that the designation “air tool operator” was intended to apply to the labourer who works alongside the air trac driller. (*Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1969) 3 DLR (3d) 161 at 216 (Ont. H. Ct.)).

15. Two important facts emerged from the union’s evidence. Firstly, it cannot be seriously doubted that the classification “air trac driller helper” was meant to designate the labourer who works the back end of the drill rig, moving it from place to place and orienting its boom under instructions from the driller, as well as providing steel rods to the driller and capping the holes bored. Secondly, shortly before the filing of the grievance that led to this application came to the attention of the officers of the employer who consistently deal with the union and the administration of the collective agreement, the representative of the union sought to obtain the 43¢ differential for air trac driller helpers at an in-term bargaining encounter with those officers. In so doing the union gave no outward sign that it then considered that differential as a contract right which it already had.

16. Following those negotiations, by letter dated December 28, 1976, the union’s representative indicated the union’s agreement to two changes in the contract which had been offered by the employer and went on to state: “We may wish to bring the other items outlined in your communication at some other set of negotiations”. Among the “other items” offered by the employer was a 25¢ differential above the base rate for air trac driller helpers.

17. At the conclusion of the union’s case, it appearing doubtful to the Board that a *prima facie* case of latent ambiguity had been made out, argument was invited from counsel, without prejudice to the right of the employer to call its own evidence if the Board should be of the view, in the light of argument, that a *prima facie* case had been established. At the conclusion of argument of both counsel the Board made an oral determination dismissing the application.

18. In our view, as we indicated above, there is no ambiguity patent on the face of the collective agreement. “Air tool operator” and “air trac driller helper” are separate classifications. The wage schedule provides an increment above the base labourer’s wage for the first classification and does not do so for the second.

19. Nor do we find any latent ambiguity made out by the extrinsic evidence. If anything the extrinsic evidence supports the view of the employer that the 43¢ wage difference was at all times within the contemplation of both parties. The position of the union representative at in-term bargaining and his subsequent letter to the employer are inconsistent with any other conclusion. This is not a case where the union sought consciously and openly to resolve an existing and outstanding grievance at the bargaining table. The matter was never discussed in that light.

20. If it can be said that a latent ambiguity does exist it must, on the balance of prob-

abilities, be resolved in favour of the employer. The fact that the union sought to gain the 43¢ differential for air trac driller helpers without as much as suggesting to the employer's bargaining committee that it already had acquired that right and was prepared to grieve on it leaves the clear impression that the union, through its representative who has been closely involved with the collective agreement since its inception, did not itself so interpret its rights under the contract.

21. It is the more probable inference, from all of the extrinsic evidence adduced, that in the contemplation of both parties nothing more than the base wage rate for labourers was to be paid to air trac driller helpers. In the instant case, to conclude otherwise would be to allow the union to gain at arbitration what it could not and did not gain at the bargaining table.

22. For these reasons the application was dismissed.

1722-77-R Service Employees International Union, Local 183, AFL-CIO-CLC, (Applicant), v. VS Services Ltd., (Respondent).

Certification – Bargaining Unit – Whether part-time employees in two classifications have a different community of interest

BEFORE: Arthur Haladner, Vice-Chairman and Board Members D.B. Archer and C.G. Bourne

APPEARANCES: *Robert Blewett for the applicant; David Caryll for the respondent.*

DECISION OF VICE CHAIRMAN ARTHUR L. HALADNER AND BOARD MEMBER D.B. ARCHER

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant seeks to be certified as bargaining agent for a unit of part-time employees of the respondent. The unit applied for includes all employees of the respondent employed for not more than twenty-four hours per week in the dietary and housekeeping departments of the Trenton Memorial Hospital. The respondent objects to the bargaining unit proposed by the applicant. It takes the position that there should be two bargaining units – one for the part-time employees in dietary and one for the part-time employees in housekeeping. There are nine part-time employees in the dietary department and five in the housekeeping department.
4. At the hearing, the parties were agreed upon the following facts. The dietary and housekeeping departments are operated by the respondent under separate contracts and un-

der separate supervision. Each department has its own manager. Although the two departments are located in the same building, there is no interchange of part-time employees. The applicant holds bargaining rights for the full-time employees in the dietary department and the full-time employees in the housekeeping department. There are two collective agreements in existence, one for dietary and one for housekeeping. The agreements, however, are identical and negotiated at the same table. The development of a two-unit bargaining structure reflects historical, rather than industrial relations considerations, the original certification being for a single bargaining unit.

5. The essence of appropriateness is that the unit of employees be capable of carrying on a viable collective bargaining relationship with the employer. In determining what constitutes a viable collective bargaining structure, the Board has regard to a broad range of industrial relations considerations, the most important of which is community of interest among employees. If the employees in the unit proposed by the applicant share a community of interest, that is normally strong evidence that the unit applied for is a viable one for collective bargaining. Another important consideration in the determination of the appropriate bargaining unit is the Board's aversion to fragmentation. While the Act does not create any presumption in favour of the most comprehensive unit of employees, where the concerns of employees with respect to their terms and conditions of employment can be provided for in a single unit, the Board will encourage bargaining on that basis, unless it is demonstrated that fragmentation is desirable. This is particularly so where, as here, there are already bargaining units in existence.

6. On the evidence before it, the Board is satisfied that the dietary part-time employees share a sufficient community of interest with the housekeeping part-timers to be included in the same bargaining unit. Although there is no interchange between the two groups, as part-time employees working in the same building, they would appear to share a greater community of interest with each other than with their respective full-time counterparts. While it is true that the two departments are operated under separate contracts and under separate supervision, it was not suggested that the inclusion of the part-time employees in a single unit would in any way impair the collective bargaining process. Indeed, such could hardly be suggested, given the parties' agreement that the separation of the two groups would give rise to the same result which exists in respect of the full-time employees, namely, the negotiation at the same table of identical collective agreements.

7. The Board finds that all employees of the respondent at the Trenton Memorial Hospital, employed for not more than twenty-four (24) hours per week, save and except the executive housekeeper, dietitians, student dietitians, supervisors, persons above the rank of supervisor and employees covered by subsisting agreements with the applicant, constitute a unit of employees appropriate for collective bargaining.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Of the fourteen employees in the unit found by the Board to be appropriate, eleven employees have signed membership cards indicating their support for the applicant. The membership evidence filed by the applicant complies fully with the Board's requirements.

9. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER C.G. BOURNE:

1. I dissent from the view of my colleagues.
 2. In my view it would be logical and reasonable to recognize separate bargaining units to correspond to the full-time units already in existence.
 3. The major community of interest would seem to be geographical but the important fact is that the dietary and housekeeping units are recognized as being independent entities with separate functions and reporting responsibilities.
 4. It also appears to me that there are labour relations implications which have a bearing, and which indicate that the two functions which bargain separately (regardless of corresponding terms), and which are separately contracted for, should remain apart.
-

1959-77-U Christian Labour Association of Canada, (Applicant), v. Rayco Stamping Products Limited, (Respondent).

Lockout – Effect of Termination of lockout prior to application for direction – Whether Board will issue direction

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and F.W. Murray.

APPEARANCES: *William Herridge, Q.C., C. John Vanderlaan and John Kamphof for the applicant; C.F. Clark, R.D. Turner and J.S. Kasurak for the respondent.*

DECISION OF THE BOARD; March 31, 1978.

1. This is an application brought under section 83 of the *Labour Relations Act* seeking a declaration that the respondent's actions constitute an unlawful lock-out; an order that the respondent desist from that unlawful lock-out; and a declaration that the provisions of section 84 of the *Labour Relations Act* apply or, alternatively, damages for the wages and other benefits lost during the period of the lock-out.
2. At the time of the hearing of this matter the parties had settled their collective bargaining dispute, and that settlement had been ratified by the employees in the bargaining unit. As a result of this settlement, the respondent was in the process of starting up its operations and recalling its employees. The evidence presented to us, therefore, left no doubt that the conduct sought to be impugned in the application had come to an end.
3. In these circumstances, the Board must address an initial question of whether, even if the facts alleged in the application can be proven, it ought to decline to exercise its discretionary remedial powers under section 83 of the Act to issue a declaration and direc-

tion in respect of an unlawful lock-out. In exercising its remedial discretion to issue a declaration or direction in respect of an alleged strike under section 82, the sister provision to section 83, the Board has adopted a general approach of not granting a remedy where the illegal work stoppage is spent. A parallel approach, in our view, is justified where the economic sanction in question is the lock-out rather than the strike.

4. The remedy in section 83, like its counterpart in section 82, is essentially a preventive remedy, serving to either restrain an anticipated illegal lock-out or to curtail the continuation of an illegal lock-out once it has commenced. The effectiveness of this remedy, therefore, requires that applications under section 83 be brought promptly by an applicant and be processed expeditiously by the Board. Recognizing the importance of the latter factor, the Board follows a general practice of putting such applications on for an early hearing when so requested by the applicant. Once the lock-out has ended and employees have been recalled to their jobs, however, the need for a preventive remedy becomes far less apparent. When the lock-out is spent, the Board must be convinced that some useful industrial relations purpose would be served by issuing a remedy under section 83. Considerations similar to those taken into account by the Board when exercising its discretion under section 82 apply. A past pattern of unlawful lock-outs, the likelihood of a recurrence of a lock-out, and the general importance of the issues raised in an application, are all factors influencing the exercise of the Board's discretion under section 83.

5. Do such factors exist in this case? The evidence does not reveal a past pattern of unlawful lock-outs nor does it point to a likelihood of future lock-outs. The primary issue in dispute is the interpretation of a "bridge" provision in the collective agreement purporting to extend the agreement during negotiations. This issue, in our view, concerns only the parties and can be appropriately resolved through grievance arbitration, if the parties wish to carry the matter further.

6. The applicant argued, however, that a failure by the Board to issue a remedy under section 83 in cases such as this would allow employers to assert illegal economic pressure right up to the eve of the hearing, giving them unfair advantage in collective bargaining. This argument against the Board's general policy of remedial restraint where a labour dispute has ended, in our view, fails to recognize some important considerations. First, the remedies provided by section 82 and section 83 are expeditious remedies, so that continuing illegal economic pressure can be restrained quickly. Although the Board's general policy of not granting a remedy under section 82 and section 83 where the labour dispute has ended may allow some employers and unions a "first bite" (as counsel for the applicant put it), that bite can only be a very limited one because of the expeditious nature of these remedies. It might be pointed out in this case that the applicant could have applied immediately to the Board for relief against what it considered to be illegal economic pressure but instead waited some eleven days. The Board's refusal to grant a remedy in circumstances such as this, moreover, does not preclude a party from seeking other industrial relations remedies. As we have already pointed out in this case, the applicant has recourse to grievance arbitration if, as it alleges, the collective agreement was in existence at the relevant time. Finally, it should be noted that the Board's policy of remedial restraint is one that operates fairly in the sense that it applies to both employers and unions. If either an illegal strike or illegal lock-out has been terminated prior to an application for a declaration of direction, then the general presumption is that a remedy under either section 82 or section 83 will not issue, since no useful labour relations purpose can be served at this stage by an exercise of the Board's remedial authority under these sections.

7. For the reasons given above, this application is dismissed.
-

1484-77-M Labourers' International Union of North America, Local 1089, (Applicant), v. **Bigelow-Liptak of Canada Ltd.** Sarnia Construction Association, (Respondents).

Arbitration – Dispute concerning shift scheduling – Meaning of term “five consecutive working days”

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

APPEARANCES: *A. M. Minsky and R. D'Andrea for the applicant; D. Butt and T. H. Prescott for the respondent.*

DECISION OF THE BOARD; March 13, 1978.

1. This is an application under section 112a of The Labour Relations Act. The applicant has referred a grievance concerning the interpretation and alleged violation of the collective agreement in effect between the parties to the Labour Relations Board for final and binding determination.

2. The parties have agreed that this grievance shall be governed by and heard in the context of the following agreed facts:

“1. The parties are bound each to the other by a collective agreement dated July 8th, 1975 between the Sarnia Construction Association representing those companies defined as “Members” of the Sarnia Construction Association and the Labourers' International Union of North America, Local 1089 attached hereto as Schedule ‘A’. The employer Bigelow-Liptak of Canada Ltd. is bound by the said collective agreement (‘the Collective Agreement’).

2. The project undertaken by the employer, Bigelow-Liptak of Canada Ltd. on the Canadian Industries Limited site in Courtright, Ontario, is governed by and subject to the Collective Agreement referred to in paragraph 1 hereof.

• • •

4. The grievors, Gary Forbes, Edward Unsworth and Milton Unsworth performed work for their employer, Bigelow-Liptak of Canada Ltd. at its project in connection with the Canadian Industries Limited site at Courtright, Ontario on the days and at the hours listed below:

	Hours Paid
Wednesday Oct. 19, 1977 8:00 p.m. - 6:00 a.m.	13 hrs.

Thursday	Oct. 20, 1977	8:00 p.m. - 6:00 a.m.	13 hrs.
Friday	Oct. 21, 1977	8:00 p.m. - 8:00 a.m.	17 hrs.
Sunday	Oct. 23, 1977	8:00 p.m. - 8:00 a.m.	24 hrs.
Monday	Oct. 24, 1977	8:00 p.m. - 8:00 a.m.	17 hrs.
Tuesday	Oct. 25, 1977	8:00 p.m. - 6:00 a.m.	13 hrs.
Wednesday	Oct. 26, 1977	8:00 p.m. - 8:00 a.m.	17 hrs.
Thursday	Oct. 27, 1977	8:00 p.m. - 6:00 a.m.	13 hrs.
Friday	Oct. 28, 1977	8:00 p.m. - 8:00 a.m.	17 hrs.
Saturday	Oct. 29, 1977	8:00 p.m. - 6:00 a.m.	20 hrs.
Sunday	Oct. 30, 1977	8:00 p.m. - 6:00 a.m.	20 hrs.
Monday	Oct. 31, 1977	8:00 p.m. - 8:00 a.m.	17 hrs.
Tuesday	Nov. 1, 1977	8:00 p.m. - 6:00 a.m.	13 hrs.

The Respondent recognizes that under Article 9 Shift Work, the Employer, Bigelow-Liptak of Canada Ltd. erred in calculating total hours paid to the grievors, and in the event the Board finds a shift was properly established, the Employer would agree to make the following corrections to the above schedule: -

Wednesday	October 19, 1977	14 hrs.
Thursday	October 20, 1977	14 hrs.
Friday	October 21, 1977	18 hrs.
Monday	October 24, 1977	18 hrs.
Tuesday	October 25, 1977	14 hrs.
Wednesday	October 26, 1977	18 hrs.
Thursday	October 27, 1977	14 hrs.
Friday	October 28, 1977	18 hrs.
Monday	October 31, 1977	18 hrs.
Tuesday	November 1, 1977	14 hrs.

5. Prior to Wednesday, October 19, 1977 the Employer, Bigelow-Liptak of Canada Ltd., had not worked a scheduled second shift for evening work on the Project.
6. (A) The grievors referred to in paragraph 4 hereof received 7 hours pay for 7 hours worked, plus overtime at double time for all hours worked in excess of seven hours per shift Monday through Friday inclusive. Double time was paid for all hours worked on Saturday and Sunday.

(B) The Respondent acknowledges that the grievors should have received 8 hours pay for seven hours worked as indicated in the corrected schedule in item 4 hereof.
7. On October 18, 1977 the Employer, Bigelow-Liptak of Canada Ltd. notified the Union of its intention to establish a second shift commencing at 8:00 p.m. October 19, 1977.
8. The Parties acknowledge that two full shifts were worked within a 24 hour period on each of the days in question, and that each of the shifts continued in excess of 8 hours duration.

9. The issue between the Parties concerns whether there was a proper establishment of a second shift pursuant to Article 9 of the Collective Agreement i.e. – Namely, would Wednesday, Thursday, Friday, Monday and Tuesday constitute a properly established shift of ‘at least five consecutive working days’ within the meaning of Article 9 of the Collective Agreement as contended by the respondent, or whether, as the applicant alleges, the grievors should have received overtime pay for all hours worked on October 19, 20 and 21, 1977.”

3. The question before the Board is whether the time worked from Wednesday, October 19, 1977 through Friday, October 21, 1977 was time worked within a properly established shift. If it was, then the grievors should have been paid, as they were (subject to a slight error in calculation), according to the shift rates set out in Article 9.400 of the collective agreement. If, on the other hand, the time worked on Wednesday, Thursday and Friday was not within a properly established shift, then the grievors should have been paid double time pursuant to the provisions of Article 8.300 of the agreement.

4. The dispute between the parties centres on the interpretation of Article 9.100 of the agreement, which reads as follows:

In the event of it becoming necessary to work shift work in any job, to qualify as a “Shift Job”, two full shifts must be worked in any 24 hour period, and each of these shifts must continue for at least *five consecutive working days*.

(emphasis added)

5. Counsel for the applicant argued that “working days” should be defined as any day upon which the employer could schedule work. Under the terms of this collective agreement that would be any day of the year. Accordingly, counsel for the applicant contends that if a shift begins on a Wednesday, it must continue on Thursday, Friday, Saturday and Sunday to fall within the requirements of Article 9.100 of the agreement. In the alternative, counsel for the applicant argues that if Saturday and Sunday are not to be considered working days, then in order to constitute a properly established shift, the shift would have to begin on a Monday so that it could run for five consecutive working days. Counsel contends, in other words, that if Saturday and Sunday are not considered working days then it would be impossible to schedule five consecutive working days commencing on, for example, a Wednesday because there would be a break between the Friday and the Monday and the five scheduled working days would not then, in his view, be five consecutive working days.

6. The representative for Bigelow-Liptak of Canada Ltd. argued that a working day should be defined as any day from Monday through Friday but should not include Saturday, Sunday or holidays.

7. Article 6.100 of the collective agreement provides that the regular working week shall be made up of forty hours, eight hours per day, Monday to Friday inclusive. Counsel for the applicant argues that since the collective agreement defines a regular working week as Monday through Friday, a regular working day would be a day between Monday and Friday inclusive. In his view, since Article 9.100 of the agreement uses the term “working

days” rather than “regular working days”, then “working days” must mean something more than “regular working days”.

8. The term “working days” appears elsewhere in the collective agreement. Article 4.000, which deals with the grievance procedure, uses the term “working days” in establishing the time limits for the various steps of the grievance procedure. Article 5.000 concerns the arbitration procedure and uses both the terms “working days” and “days” to set the time limits involved in the various procedures leading to arbitration. Any confusion that might otherwise arise through the simultaneous use of the terms “working days” and “days” is clarified by Article 5.900 which reads as follows:

In determining the time which is allowed in the various steps, Saturdays, Sundays, and Statutory Holidays shall be excluded and any time limit may be extended by Agreement in writing.

9. Through Article 5.900, “working days” and “days” take on the same meaning as “regular working days”, that is, any day except Saturdays, Sundays and statutory holidays. Although any potential conflict is resolved by Article 5.900, the Board is left to wonder why the framers of the collective agreement chose to employ the potentially inconsistent terms of “working days” and “days” in defining the time limits for grievances and arbitrations. The inconsistency raises the question as to how much attention was given to potential distinctions between such phrases as “regular working days” and “working days”. In view of the above, it is difficult for the Board to accept counsel’s argument that the mere co-existence of the two different terms, “regular work week” and “working days” is evidence that a distinction in meaning was intended between “regular working days” and “working days”. We must look for a less equivocal indication of the intention of the parties.

10. A reading of the collective agreement in its entirety reveals a clear intention to treat Saturdays, Sundays and holidays differently from Mondays through Fridays. As indicated above, this distinction is drawn in setting time limits for grievances and arbitrations. The dichotomy is further established both in defining the regular working week and in setting the rates for hours worked. Double time is paid for any work done on Saturdays, Sundays and holidays.

11. Counsel for the applicant relied on *National Hosiery Mills*, 5 LAC 1905, to support its suggested definition of “working days”. In that case, the grievors alleged that the collective agreement had been violated because they had not been paid for the statutory holiday of Good Friday. The collective agreement stated that on statutory holidays employees would be paid for the number of hours they normally would have worked had there been no holiday. The arbitration board held that there had been no violation of the collective agreement because the grievors would not normally have worked on the Friday since they were regularly scheduled to work only on Tuesdays, Wednesdays and Thursdays. In reaching this conclusion, the Board at page 1906 made the following statement with respect to the definition of a working day:

The Board is of the opinion that a working day is properly defined as any day on which the Company requires the services of an employee. A regular working day, therefore, would therefore be a working day which recurs uniformly each week at the time the Statutory Holiday occurs, namely in this case, April 16th, 1954.

12. The facts in *National Hosiery Mills* (supra) differ fundamentally from the facts before us. In *National Hosiery Mills* the employees worked on a recurring, uniform schedule each week. The situation confronting the parties before us, and indeed the construction industry in general, is not infused with such regularity. While normally construction employees work Monday through Friday rather than Saturday and Sunday, unless specifically instructed otherwise, it is equally possible that on certain jobs and under special circumstances persons will work on the weekends as well. The definition of "working day" set out in *National Hosiery Mills* is not readily transferrable to this fluid situation. In the circumstances before the Board, it would be impossible to establish a predictable definition of "working day" based on the definition of "any day on which the Company requires the services of an employee" because the parties don't know ahead of time when work will be scheduled. No matter what definition of "working day" is to be decided upon, it is essential that it at least lead to certainty. Accordingly, in the context of this case, the Board finds that *National Hosiery Mills* provides the Board with no assistance.

13. Having regard to the totality of the collective agreement, the Board is satisfied, on the balance of probabilities, that the term "working days" in the context of the phrase "five consecutive working days" in Article 9.100 was intended by the parties to differentiate normal working days from the Saturdays, Sundays and holidays upon which work might also be scheduled. In reaching this conclusion we take particular note of the casual use of terms within the collective agreement as evidenced by the simultaneous use of the terms "days" and "working days" in the grievance and arbitration sections of the collective agreement and the repeated distinction drawn throughout the agreement between weekdays on the one hand, and weekends and holidays on the other.

14. For the reasons given above, the Board is satisfied that to meet the specifications for a shift set out in Article 9.100 of the collective agreement, the employer must schedule the shift for at least five consecutive working days, defined to include Mondays through Fridays, exclusive of statutory holidays.

15. Turning to the applicant's alternative argument, it is suggested that the only possible way for an employer to schedule five consecutive working days, as defined above, is to begin on a Monday. Counsel directed the Board to numerous dictionary definitions of "consecutive", which include the following: "to follow in uninterrupted succession", "following continuously", "succeeding one another in regular order", "marked by logical sequence", and "characterized by logical sequence". Counsel emphasized the words "continuous" and "uninterrupted" and stated that it would be impossible to have consecutive working days that would span a weekend because they would be interrupted by Saturday and Sunday. This argument would further indicate that it would be impossible to schedule a shift of five consecutive working days in any week containing a statutory holiday because the working days would be interrupted. The suggestion that "consecutive" means totally uninterrupted ignores the other aspect of the definition which emphasizes logical sequence and regular order. Having regard to the full scope of the dictionary definitions of "consecutive", the Board is satisfied that "consecutive" means an uninterrupted sequence of like things. In the Board's view it is not a misuse of the English language to speak in terms of "five consecutive Mondays". The consecutive character of like things is not displaced through an interruption if the interruption is made by something of a different nature. Just as consecutive Mondays are not disturbed by the interruption of other days of the week, consecutive working days are not displaced by intervening holidays, Saturdays or Sundays.

In view of this definition of "consecutive", the Board is satisfied that it would be possible for an employer to begin a shift of five consecutive working days on any day of the week from Monday through Friday inclusive.

16. Applying these findings to the case at hand, the Board finds that the employer properly established a shift by scheduling work on Wednesday, Thursday, Friday, Monday and Tuesday from October 19th through October 25th. Accordingly, the alleged violation of the collective agreement is hereby dismissed.

17. We note, however, the agreement of the parties that the respondent erred in the calculation of the total hours paid to the grievors as set out in paragraph 4 of the Agreed Statement of Facts.

1091-77-R United Brotherhood of Carpenters and Joiners of America, AFL, CIO, CLC, (Applicant), v. **Premium Forest Products Ltd.**, (Respondent).

Certification – Membership Evidence – Effect of irregularities in solicitation of membership evidence

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *H. Goldblatt, T. Harkness and R. Brixhe for the applicant; R. C. Fillion, R. C. Cohen and S. Spears for the respondent.*

DECISION OF THE BOARD; March 10, 1978.

1. The name "United Brotherhood of Carpenters and Joiners, AFL, CIO, CLC" appearing in the style of cause of this application as the name of the applicant is amended to read "United Brotherhood of Carpenters and Joiners of America, AFL, CIO, CLC". Also, the name "Premium Forest Products Ltd., A Division of Dragoon Investments Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read "Premium Forest Products Ltd."

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. In a decision dated October 27, 1977, the Board directed the taking of a pre-hearing representation vote and also directed that the ballot box be sealed. The Registrar was directed to list this matter for hearing for the purposes of entertaining the evidence and representations of the parties with respect to the matters raised by the respondent in its reply to this application. The pre-hearing representation vote was conducted on November 11 and 12, 1977, and the ballot box was sealed.

4. In its reply the respondent made certain allegations with respect to the conduct of the applicant. The allegations included, *inter alia*, instances where it was the respondent's

position that certain of its employees who had signed membership cards in the applicant had not personally made any monetary payment on account of dues or initiation fees. Upon receipt of the names of the employees who were alleged not to have personally made such payments, the Board conducted its usual investigations and subsequently listed this matter for hearing. The purpose of this hearing was to enable the Board to conduct an inquiry into the circumstances surrounding the alleged payment of dues or initiation fees by Donald Slauson and Lester Carter. To this end the Board served subpoenas on Donald Slauson, Lester Carter, Thomas Harkness and Onelio Zanin. Mr. Harkness signed the Form 8, Declaration Concerning Membership Documents, which accompanied this application for certification and Mr. Zanin is the person who is indicated as having received the monetary payment on account of dues or initiation fees with respect to the membership cards of Messrs. Slauson and Carter. The Board heard evidence from these four persons.

5. At the outset the Board wishes to make it quite clear that Mr. Harkness was in no way involved in any of the improprieties which occurred in this application. The Board is satisfied that he made reasonable inquiries before he signed the Form 8, Declaration Concerning Membership Documents.

6. Mr. Slauson was clearly a highly nervous and unsettled witness. He gave his evidence in a confusing manner and there were several inconsistencies in his evidence. In our view he presented a confused version of what he believed had happened at the time he signed his membership card in the applicant. On the basis of the evidence before it the Board is not prepared to find that Mr. Slauson did not pay one dollar with respect to dues or initiation fees at the time he signed his membership card in the applicant.

7. Mr. Carter and Mr. Zanin gave evidence before the Board. Subsequently the Board recalled Mr. Carter to give additional evidence and the applicant recalled Mr. Zanin to give evidence in response to Mr. Carter's additional evidence.

8. Mr. Carter testified that he signed a membership card on September 1, 1977. While he was not "really interested" in joining the applicant, he did sign a membership card because he was told by Mr. Zanin that if he did not join at that time it would cost him fifty dollars to join at a later date. Mr. Carter informed the Board that at the time of signing he told Mr. Zanin that he did not have the dollar to join the applicant. According to Mr. Carter, Mr. Zanin told him that he would give him the money. The witness gave evidence that he has never paid any money to Mr. Zanin or anyone else in connection with his membership card. Mr. Zanin recorded the payment of one dollar on his membership card and gave Mr. Carter a receipt.

9. Mr. Zanin testified that he approached Mr. Carter about signing a membership card. He gave evidence that he approached Mr. Carter on two occasions. He informed the Board that on the first occasion, September 1, 1977, Mr. Carter told him that he did not have any money and that it was agreed that he should sign the card on that date and pay one dollar to Mr. Zanin on the next day. According to Mr. Zanin, he returned to the same location on September 2, 1977, and received one dollar from Mr. Carter.

10. During cross-examination by Mr. Filion, Mr. Zanin categorically denied that he had given out membership cards to which he had previously affixed his own signatures, to employees for the purpose of signing membership cards. Upon being recalled to give evi-

dence, Mr. Carter produced five membership cards which had been signed by Mr. Zanin. Mr. Carter testified that he had received these five membership cards from Mr. Zanin at a meeting which had been called by the applicant on September 7, 1977, and had been instructed to sign up his friends. In addition, Mr. Zanin contradicted himself on the number of times he had met Mr. Carter between September 2 and September 8, 1977.

11. Mr. Carter testified that during the meeting on September 7, 1977, several people were given membership cards which had previously been signed by Mr. Zanin. He gave evidence that the three or four persons who were seated at the table where he was seated were each given from four to eight of such membership cards. When Mr. Zanin was recalled to give evidence he informed the Board that he gave out such membership cards to those who were present. He stated that he merely wanted them to sign membership cards at the meeting. Mr. Zanin insisted that he gave no more than two such membership cards to any one person at the meeting. He conceded that he had given such membership cards to persons he knew had already signed membership cards in the applicant.

12. Mr. Zanin offered no satisfactory explanation for the contradictions in his behaviour at the meeting. No explanation was forthcoming on why Mr. Carter received five cards rather than one or two. While Mr. Zanin admitted that on September 7, 1977, he knew that Mr. Carter had previously signed a membership card, he gave no explanation of how to reconcile such behaviour with his testimony that such membership cards were to be signed only at the meeting.

13. Mr. Carter's credibility as a witness was not shaken during examination by the Board and incisive cross-examination by counsel. On the other hand, Mr. Zanin's credibility was severely shaken during similar examination and cross-examination. There were several contradictions and inconsistencies in his evidence. Having regard to the evidence of Mr. Carter and Mr. Zanin and to their demeanour the Board has no hesitation in accepting the evidence of Mr. Carter in preference to the evidence of Mr. Zanin. In the result, the Board finds that Mr. Carter did not personally make any monetary payment on account of dues or initiation fees in connection with the membership card which he signed on September 1, 1977, and that this fact was known to Mr. Zanin.

14. Mr. Zanin was an organizer who was employed and paid by the applicant. He testified that he secured approximately one third of the applicant's evidence of membership with respect to this application. The Board has considered the representations of the parties. On many occasions the Board has examined instances where there was not any monetary payment on account of dues or initiation fees. The basic principles which the Board has applied to instances of non-payment of dues or initiation fees has been set forth in the *Webster Air Equipment Ltd.* case, 58 CLLC ¶18,110 as follows:

... However, since the Board is compelled to rely to such an extent on evidence which by the very nature of things, is not subject to examination by the parties to the proceedings (see section 72(1) [now section 100] of *The Labour Relations Act*), it must be very circumspect in accepting it and it must insist on the highest standards of integrity on the part of those who submit such evidence. Any attempt to mislead the Board or any failure to make full disclosure of all material facts must weigh heavily against an applicant. In dealing with this situation, the

Board has made a distinction between two types of cases: (i) where the action impugned is that of a responsible officer or official of a union, and (ii) where the action is that of a supporter or canvasser on behalf of an applicant who occupies an inferior office or no office in the union. In so far as the first of these is concerned, the Board said in the *RCA Victor Company Case*, (1953) CCH Canadian Labour Law Reporter, Transfer Binder '49-'54, ¶17,067 [53 CLLC ¶17,067], C.L.S. 76-412, that even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, "the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union". Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the Board has taken the position that the card in respect of which the irregularity is established is disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members.

15. Mr. Zanin was a responsible officer or official of the applicant and having regard to the foregoing principles the Board concludes that it cannot place reliance on any of the membership evidence submitted by the applicant. The Board revokes paragraph two of its decision in this matter dated October 27, 1977. The Board now finds that less than thirty-five per cent of the employees of the respondent in the voting constituency defined in paragraph three of its decision in this matter dated October 27, 1977, were members of the applicant at the time this application was made.

16. The Board therefore directs the Registrar not to cause the ballots which were cast in the pre-hearing representation vote to be counted. In the circumstances of this application it is not necessary for the Board to entertain the allegations of improper or irregular conduct which have been made against the applicant.

17. This application for certification is dismissed.

18. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

1359-77-R Marilyn Ducharme, (Applicant), v. Teamsters Union Local 938, (Respondent), v. **Sudbury & District Society for Prevention of Cruelty to Animals**, (Intervener).

Termination – Whether petition in support of application voluntary

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members R. D. Joyce and O. Hodges.

APPEARANCES: *Marilyn Ducharme on her own behalf; no one for the respondent; W. D. Woodliffe for the intervener.*

DECISION OF ALTERNATE CHAIRMAN RORY F. EGAN, AND BOARD MEMBER R. D. JOYCE: March 1, 1978.

1. The name “General Truck Drivers Union Local 938 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America” appearing in the style of cause of this application as the name of the respondent is amended to read: “Teamsters Union Local 938”.
2. This is an application under section 49 of The Labour Relations Act for a declaration terminating the bargaining rights of the respondent union.
3. In support of the application, the applicant filed a document requesting the Board to de-certify the respondent. The document bears the signatures of all four employees in the bargaining unit.
4. The uncontradicted evidence is that the four employees who comprise the bargaining unit decided among themselves that the dues required by the respondent were excessive in view of the services that they had obtained, and that they should therefore dis-pense with the respondent as bargaining agent.
5. Having reached that decision, all four employees proceeded, in a body, to inform the Executive Secretary of the intervener of their decision.
6. The evidence indicates that neither the employees nor the Executive Secretary knew how to formalize the decision. After discussion of the matter, the Executive Secretary of the intervener undertook to get the necessary information and forms from the Board in order to implement the procedure.
7. The document bearing the signatures of the employees was prepared by the applicant in the office of, and on the letterhead of, the intervener. The applicant is the dispatcher and works in the office of the intervener. The remaining three members of the bargaining unit are control officers whose work is mainly on the outside. The document was signed in the office, but the Executive Secretary was not present when this was done.
8. In all applications before the Board for either certification or “de-certification”, the Board examines the circumstances surrounding the preparation of the evidence in order to discover whether there has been improper interference by the employer to such an extent

that it can be said that the evidence does not represent the voluntary wishes of the employees.

9. In the present case, it is plain, upon the evidence, that the whole of the bargaining unit, without any instigation from or interference by management, reached the unanimous decision that they did not want to be represented by the respondent. Again, all four members of the bargaining unit attended on management and, as a body, advised that they did not want to bargain through the respondent union.

10. In these circumstances, it would appear to be absurd for the Board to allow the obvious, voluntary and unanimous decision of the bargaining unit to be frustrated by any action of management which, in this case, amounts to obtaining advice on the purely mechanical process to be followed after the decision had been made. In our opinion, the employees in the particular circumstances of this case ought not to be denied the opportunity to further express themselves by means of a representational vote.

11. Having regard to the submissions of the parties, the Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of Sudbury & District Society for Prevention of Cruelty to Animals in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on December 9, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

12. The Board directs that a representation vote be taken of the employees of the intervenor. Those eligible to vote are all employees of the Society at Sudbury, save and except Senior Animal Control Officer, persons above the rank of Senior Animal Control Officer, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Sudbury & District Society for Prevention of Cruelty to Animals.

14. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. The facts in this case are not in dispute. The employees in the bargaining unit were concerned about the level of dues which they were required to pay to their bargaining agent and the quality of service which they had received. The employees decided that they should seek information on how the bargaining rights of the union could be terminated, and approached their employer for this purpose. Not surprisingly the employer was only too

willing to associate himself with an activity which would eliminate the trade union. Thereafter it appears that it was the employer who obtained the necessary documents from the Board; it was the employer who ascertained that a petition in support of the application would be necessary; it was in the offices of the employer that that petition was prepared; it was on the employer's letterhead that the petition was typed; and it was in the offices of the employer that the petition was signed. In the circumstances I am also prepared to infer that the fact of signing was communicated to the employer by the applicant – who works in the employer's office. It is hardly surprising that the employees signed the petition requesting termination of the union's bargaining rights. Even if they had had a change of heart, how could they be reasonably expected to refuse to sign a petition with which the employer was so closely associated – especially where, as here, the bargaining unit contains only four employees and a refusal would almost certainly be communicated to the employer?

3. Section 49 of The Labour Relations Act requires that the Board be satisfied that forty-five per cent of the employees have *voluntarily* signified in writing that they no longer wish to be represented by the union on the terminal date, i.e., on December 9, 1977. How can the Board ascertain the wishes of these employees or put any weight on a petition prepared under these circumstances? Even if we are prepared to find that at some point in the past the employees expressed dissatisfaction with the union and the desire to terminate the union's bargaining rights, how can we be assured *on the terminal date* that this petition, prepared at the instance of the employer, was voluntary? In my view, the issue before us is very simple: were the employees, *when they signed this petition*, voluntarily indicating their desire to terminate the union's bargaining rights? It is insufficient to know that some time in the past the employees had expressed a desire to terminate the bargaining rights. In my view, the employer interference in this case has made it impossible for us to make the finding which we are required by section 49 of the Act to make.

4. Where, as here, the employer has been intimately involved with the preparation of the termination application, I am simply unable to find that the petition is voluntary; nor, following the interference of the employer, is there any assurance that even a secret representation vote would now reveal the true wishes of these four employees. In *Veres Wire*, [1976] OLRB Rep. July 337, the involvement of a managerial person in the organizing campaign prompted the Board to doubt the voluntariness of the membership evidence even though the managerial person had directly solicited only 3 of the 39 cards. It was sufficient to dismiss the application that management had been associated with the organization drive and the application for certification. I would apply the same principles to this case and dismiss the application.

1689-77-R Mr. Denys Griffith, (Applicant), v. The Workers Union of Queen Elizabeth Hospital (C.N.T.U.), (Respondent), v. **V.S. Services Q.E. Hospital**, (Intervener).

Termination – Petition signed by employees rejecting bargaining agent – Effect of employ-

ees signing petition reaffirming their support

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members M.J. Fenwick and W.H. Wightman.

APPEARANCES: *Denys Griffith and David Moore for the applicant; B. Chercover, Peter Curtis, Vince LeCair and D. McDougall for the respondent; Dave Caryll, Murray Kane and Alex McFinik for the intervener.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER M.J. FENWICK; March 14, 1978.

1. This is an application for termination of bargaining rights brought under Section 49 of the Act. Under Section 49(3) of the Act the Board is required to ascertain "the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause (j) of sub-section (2) of section 92, that they no longer wish to be represented by the union ..."

2. A statement of desire bearing the signatures of 42 of the 78 employees in the bargaining unit was filed with the Board in support of the instant application. There was also filed with the Board, however, a statement of reaffirmation bearing the signatures of 49 bargaining unit employees. The preamble to the statement of reaffirmation states:

"This will re-affirm my support for the Workers Union of Queen Elizabeth Hospital (C.N.T.U.) and I wish for the purposes of collective bargaining to continue to be represented by the Workers Union of Queen Elizabeth Hospital (C.N.T.U.)."

22 of the 49 signatures on the statement of reaffirmation correspond with or overlap signatures affixed to the statement in favour of termination of bargaining rights.

3. Counsel for the applicant asked the Board to disregard the statement of reaffirmation and direct the taking of a representation vote if satisfied as to the voluntariness of the statement in favour of termination. It is his position that section 49(3) is a mandatory section which requires the Board to order the taking of a representation vote if not less than 45 per cent of the employees in the bargaining unit signify in writing that they no longer wish to be represented by the respondent trade union. The Board has consistently ruled that statements of reaffirmation, if filed within the time requirements of Section 49(3), are evidence of employee wishes which must be considered by the Board in the exercise of its authority under Section 49(3) of the Act. (See re *Mitten Industries* case [1976] OLRB Rep. March 76, *Redpath Sugar* case, [1974] OLRB Rep. July 502, *Swingline of Canada Ltd.* case [1973] OLRB Rep. March 159, *Great Atlantic and Pacific Tea Company* case [1970] OLRB Rep. Dec. 934 and *White Die Casting Company Limited* case [1970] OLRB Rep. Dec. 848.) The statement of reaffirmation in this case was filed in compliance with the time requirements of Section 49(3) of the Act. It was circulated amongst the bargaining unit employees some 9 days following the circulation and signing of the statement in support of termination of bargaining rights and accordingly, if it is found to be a voluntary expression of those who signed it, it will cause the Board to find that less than 45 per cent of the employees in the

bargaining unit have signified in writing as of the terminal date (the time as is determined under clause (j) of subsection 2 of section 92) that they no longer wish to be represented by the trade union.

4. The Board followed its normal practice in dealing with a statement of reaffirmation and called evidence in support of the voluntariness of the statement of reaffirmation. The Board heard evidence from Mr. Peter Curtis, the representative of the respondent union responsible for servicing the Queen Elizabeth Hospital local. His evidence, which was uncontradicted, satisfies the Board as to the bona fides of the origination and preparation of the statement of reaffirmation. The Board heard first-hand evidence from Mr. V. LeClair, the local union president, and Mr. M. Talpa, the local union treasurer, as to the circumstances surrounding the circulation of the statement. Mr. LeClair witnessed all but three of the signatures appearing on the statement of reaffirmation. Notwithstanding the inability of Mr. LeClair to recall whether he signed certain persons in the storeroom or the back shop – two rooms adjacent to the kitchen where he works – the Board is satisfied that there was no management involvement in the circulation of the statement. The Board is further satisfied on the evidence before it that those who signed the statement of reaffirmation were not threatened or coerced.

5. Counsel for the applicant argued that in the circumstances of a termination application the union, as the exclusive bargaining agent, enjoys a position of influence over the employees in the bargaining unit which is analogous to the position of influence enjoyed by the employer. It is his submission that the evidence which establishes that the president of the respondent union approached bargaining unit employees individually during working hours, should cause the Board to find that “tacit, unspoken pressure” was exerted such that the statement of reaffirmation does not represent the true wishes of those who signed it. The Board is unable to accept the submission of counsel in this regard. A trade union which holds exclusive bargaining rights does not enjoy a position of influence over the employees in the bargaining unit as does the employer who can hire, fire or otherwise affect an employee’s career. The very fact that the bargaining rights held by the union can be terminated by bargaining unit employees underscores the fundamental difference between the position held by the employer on the one hand and the trade union on the other.

6. The Board is satisfied on the evidence before it that the statement of reaffirmation is a voluntary expression of those who signed it. Having regard to the number of employees who signed the statement of union reaffirmation subsequent to having signed the statement in support of the termination of the union’s bargaining rights, the Board must find that it has ascertained that less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing as of the terminal date of this application that they no longer wish to be represented by the union.

7. Accordingly, this application is hereby dismissed.

DECISION OF BOARD MEMBER W.H. WIGHTMAN:

1. Section 49(3) of the Act allows the Board to direct a secret ballot vote in the event not less than 45% of the employees in the bargaining unit have voluntarily indicated they no longer wish to be represented by the incumbent union.

2. Based on the Board's past practice the majority have concluded that a counter-petition submitted by the incumbent was voluntary and that the effect of overlapping signatures is to reduce the applicant's petition (assuming the latter were to have been proven voluntary) to a point below 45% of the employees and that a vote should therefore not be granted.

3. I would have proceeded to enquire as to the voluntary nature of the applicant's petition and, assuming we were to have found it to be voluntary in its nature, I would have ordered a vote notwithstanding the effect of the counter petition on the count. To do otherwise would be to treat union petitions, as opposed to employee petitions, with a lack of sympathy which, in my view, gives less consideration to the interests and wishes of employees.

1435-77-R George Johnston and Others, (Applicant), v. Local 865, International Union of Operating Engineers, (Respondent).

Termination – Collective Agreement – Timeliness – Practice – Procedure – Effect of employees naming international union when local has bargaining rights – Whether application timely having regard to effect on collective agreement of Hospital Labour Disputes Arbitration Act

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

APPEARANCES: *George Johnston for the applicant; Fred G. Grigsby for the respondent.*

DECISION OF THE BOARD; March 9, 1978.

1. This is a termination application filed under section 49 of The Labour Relations Act; the applicant seeks a declaration that the respondent union no longer represents the employees in the bargaining unit.

2. At the hearing the respondent alleged that the application should be dismissed because the applicant named the International Union rather than Local 865 as the respondent. The parties to the collective agreement signed on behalf of the employees in the bargaining unit in question are Walter P. Hogarth Memorial Hospital and the International Union of Operating Engineers, Local 865. Accordingly, the International Union is not a proper party to this application. The Board declines, however, the request to dismiss the application vis-a-vis Local 865 and amends the name: "International Union of Operating Engineers" appearing in the style of cause of this application as the name of the respondent to read: "Local 865, International Union of Operating Engineers". The Board is further satisfied that the Local received adequate notice of the application. Having regard to the representations made in the reply, the Board concludes that the reply was filed by the International Representative, Mr. Grigsby, on behalf of the Local. No objection was made in the reply that the named respondent, the International, was not a proper party. Instead, Mr. Grigsby sought to correct the name of the respondent to that of the Local in paragraph 2 of the reply and then proceeded to fill out all the information requested in the reply. In further

support of our conclusion that the Local received constructive notice of this proceeding, we note that Mr. Grigsby appeared on behalf of Local 865 in the arbitration under *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c.208 as amended by 1972, c. 152 (hereinafter referred to as *H.L.D.A. Act*) which will be discussed in more detail below.

3. The respondent further alleges that the application is untimely. To determine whether the application is timely, the Board must look to the provisions of the *H.L.D.A. Act*.

4. The duration clause of the last collective agreement in effect between the parties provided that the agreement would be effective from January 1, 1974 until December 31, 1975 with provisions for automatic renewal. In the latter part of 1974 a timely notice to bargain was provided by one of the parties. Through the following year the parties unsuccessfully sought to agree upon the terms of a new collective agreement and on December 5th the parties agreed to refer their dispute to a board of arbitration under the provisions of the *H.L.D.A. Act*. On September 23, 1977, the chairman of the board of arbitration released to the parties the award of the board.

5. Before preparing and executing a document in the form of a collective agreement incorporating the award of the board of arbitration, the parties submitted the award to the Anti-Inflation Board and subsequently appealed the A.I.B.'s rollback. The appeal was lost. Communications from the parties received by this Board after the instant hearing reveal that the parties incorporated the award of the board of arbitration into a collective agreement on January 26, 1978.

6. Once an award of a board of arbitration is incorporated into a collective agreement and executed by the parties, it becomes a collective agreement under The Labour Relations Act. Section 49(2) of The Labour Relations Act provides that in the case of a collective agreement for not more than three years, a termination application may only be brought after the commencement of the last two months of its operation. We turn then to determine the agreement's term of operation.

7. The award of the board of arbitration indicates that during the proceedings before the board, the parties agreed to a two-year contract expiring on December 31, 1977. The following sections of the *H.L.D.A. Act* must be considered in deciding firstly, whether this agreement of the parties effectively establishes the agreement's term of operation and secondly, if not, what the term actually is:

7(8) Except in arbitrations under section 5b [not applicable in this case] *the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.*

(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties *shall remain in force for a period of one year from the effective date of the document.*

(11) Notwithstanding the provisions of subsection 10 and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 45 of *The Labour Relations Act*.

(13) In making its decision upon matters in dispute between the parties, the board of arbitration may provide,

- (b) where notice was given under section 45 of *The Labour Relations Act*, that any of the terms of the agreement *except its term of operation* shall be retroactive to such day as the board may fix, but not earlier than the day upon which the previous agreement ceased to operate.

(emphasis added)

8. Having regard to sections 7(8) and 7(10) of the *H.L.D.A. Act*, the Board is of the view that the parties are precluded from establishing a term of operation which would either be retroactive or run for less than a year from the date of the award of the board of arbitration. Section 7(8) stipulates that the date the board gives its decision is the effective date of the collective agreement and section 7(10) provides that the agreement will remain in force for at least one year from the effective date of the document. Although section 7(10) provides that the parties may agree to a term of operation which will run longer than one year from the effective date of the document, the Act contains no provision for an agreement of the parties to a term of operation that would run for less than one year from the date of the decision of the board. As well, although section 7(13) of the *H.L.D.A. Act* states that the board of arbitration may provide that any of the terms of the collective agreement shall be retroactive, it specifically prohibits the arbitrator from making the term of operation retroactive. (For an interpretation of this section see the Board's decision in *Hillsdale Nursing Home*, File No. 1357-77-R, decision dated January 20, 1978.)

9. The board of arbitration dated its decision September 23, 1977. In the normal course of things, therefore, the collective agreement would remain in force for one year or until September 23, 1978. Because of the length of time that has passed since the original notice was given under section 45 of *The Labour Relation Act*, however, the provisions of section 7(11)(b) of the *H.L.D.A. Act* are set into motion.

10. Section 7(11)(b) of the *H.L.D.A. Act* overrides the term of operation established under section 7(10) and terminates the collective agreement in question, two years from the date upon which the previous collective agreement ceased to operate or, in this case, on December 31, 1977. Ironically, this is the same termination date the parties were unable to establish for themselves.

11. The term of operation of the collective agreement in question, therefore, was from September 23, 1977 to December 31, 1977. Accordingly, the termination application filed on December 13, 1977 is timely.

12. Having regard to all the evidence presented to the Board concerning the origination, preparation, and circulation of the statement of desire filed with the application, the Board is satisfied that the petition is a voluntary expression of desire. Although the evidence

indicates that Mr. Johnston's supervisor gave the employees permission to meet in the boiler room, the employer's consent to the employees' use of a room is not sufficient in this case, standing by itself, to cast doubt on the voluntariness of the petition.

13. On the basis of all the evidence before it, the Board is satisfied that not less than forty-five per cent of the employees of Walter P. Hogarth Memorial Hospital in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of December 23, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

14. The Board directs that a representation vote be taken of the employees of Walter P. Hogarth Memorial Hospital. Those eligible to vote are all stationary engineers and maintenance men employed by the employer at its business location on Lillie Street in the City of Thunder Bay on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

15. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Walter P. Hogarth Memorial Hospital.

16. The matter is referred to the Registrar.

CASE LISTINGS FEBRUARY 1978

	Page
1. Applications	
(a) Bargaining Agents Certified	49
(b) Applications Dismissed	55
(c) Applications Withdrawn	57
2. Application under the Employees Health & Safety Act	58
3. Applications for Declaration Terminating Bargaining Rights	58
4. Applications for Declaration that Strike Unlawful	59
5. Application for Declaration that Lock-Out Unlawful	59
6. Application for Consent to Prosecute (Hospital Arbitration Act)	60
7. Complaints under Section 79 (Unfair Labour Practice)	60
8. Applications under Section 55	61
9. Jurisdictional Dispute	62
10. Applications for Determination under Section 95(2)	62
11. Applications under Section 112a	62
12. Applications for Reconsideration of Board's Decision	64

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1978

BARGAINING AGENTS CERTIFIED DURING FEBRUARY

No Vote Conducted

1730-76-R: Laborers' International Union of North America, Local 493 (Applicant) v. Municipality of Casimir, Jennings, Appleby (Respondent).

Unit: "all employees of the Respondent working within the Townships of Casimir, Jennings and Appleby, save and except non-working foreman and office staff." (7 employees in the unit).

2115-76-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Spring Plastering Co. Limited (Respondent) v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of Go Drywall Limited in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0114-77-R: The Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Peel (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Sheridan Villa, Mississauga, save and except supervisors, persons above the rank of supervisor, professional medical and nursing staff, chef, office staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (149 employees in the unit).

0318-77-R: Ontario Nurses' Association (Applicant) v. La Verendrye General Hospital (Fort Frances) Inc. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity by the respondent save and except head nurses and persons above the rank of head nurse, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in the unit).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity by the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except head nurses and persons above the rank of head nurse." (26 employees in the unit).

0507-77-R: United Steelworkers of America (Applicant) v. Arnold-Nasco Limited (Respondent).
- and -

0548-77-R: United Steelworkers of America (Applicant) v. Arnold-Nasco Limited (Respondent).

Unit: "all employees of the respondent at Guelph, save and except foreman or supervisors, persons above the rank of foreman or supervisor and the confidential secretary to the vice-president." (13 employees in the unit).

0656-77-R: Retail Clerks Union, Local 409 (Applicant) v. Beaver Lumber Ltd. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees employed by the respondent at its store in Thunder Bay, Ontario, save and except department managers, persons above the rank of department manager, office and clerical staff, commissioned salesmen, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (25 employees in the unit).

Unit #2: "all office, clerical and sales employees of the respondent at its store in Thunder Bay, Ontario save and except supervisors, persons above the rank of supervisor and persons covered by other bargaining unit descriptions." (5 employees in the unit).

1186-77-R: Canadian Chemical Workers Union (Applicant) v. Druggist's Corporation Limited (Respondent).

Unit: "all office and clerical employees of the respondent at 795 Pharmacy Avenue, in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales staff and laboratory personnel." (00 employees in the unit).

1214-77-R: United Textile Workers of America (Applicant) v. Warren Knit a division of Cluett, Peabody & Co. of Canada, Limited (Respondent).

Unit: "all employees of the respondent at their plants on Bunting Road and St. Paul Street in St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office staff, mechanics on salaried payroll, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (147 employees in the unit).

1251-77-R: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Applicant) v. 358602 ONTARIO LIMITED operating as Innovative Wood Products (Respondent).

Unit: "all employees of the Respondent employed in its plant at 60 Oak Street, Metropolitan Toronto, save and except foremen, persons above the rank, office and sales staff." (27 employees in the unit).

1337-77-R: Toronto Joint Board, Amalgamated Clothing and Textile Workers Union (Applicant) v. L. Davis Textiles Co. Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at 187 Geary Avenue and 2700 St. Clair Avenue West, City of Toronto, save and except foremen, and persons above the rank of foreman, office and sales staff, Manpower trainees, students employed during the school vacation periods, and persons regularly employed for not more than 24 hours per week." (188 employees in the unit). (*Having regard to the agreement of the parties*).

1382-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: "all employees of the respondent working at London, Ontario save and except dispatchers, those above the rank of dispatcher, office and sales staff." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1482-77-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Victoria (Respondent).

Unit: "all employees of the respondent at Victoria County Home for the Aged at Lindsay, regularly employed for not more than twenty-four hours per week and students employed for the school vacation period, save and except supervisors and directors and persons above the rank of supervisor and director, Registered Nurses, Graduate Nurses, Office Staff and Chief Engineer." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1522-77-R: Retail Clerks Union, Local 486 chartered by the Retail Clerks International Union (Applicant) v. Crosby Food Services Ltd. (Respondent) v. Group of Employees (Objectors).

- and -

1523-77-R: Retail Clerks Union, Local 486 chartered by the Retail Clerks International Union (Applicant) v. Crosby Food Services Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the Municipality of Ottawa, save and except supervisors and persons above the rank of supervisor, office and sales staff, cafeteria employees, cash room clerks, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. February).

1548-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario save and except dispatchers, persons above the rank of dispatcher, office and sales staff." (12 employees in the unit). (*Having regard to the agreement of the parties*).

1568-77-R: United Steelworkers of America (Applicant) v. Irving Engineering Group Corporation (Respondent).

Unit: "all employees of the respondent company at Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in the unit).

1580-77-R: Christian Labour Association of Canada (Applicant) v. Neath & Associates Limited (Respondent).

Unit: "all bricklayers, bricklayers' apprentices; cement masons and cement masons' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1589-77-R: Canadian Union of Public Employees (Applicant) v. Hôpital Laurentien – Laurentian Hospital (Respondent).

Unit: "all employees employed for not more than twenty-four hours per week at Hôpital Laurentien – Laurentian Hospital, in the Regional Municipality of Sudbury, save and except Professional Medical Staff, Graduate and Registered Nurses, Graduate Pharmacists, Undergraduate Pharmacists, Graduate Dietitians, Student Dietitians, Technical Personnel, Executive and Administrative Secretaries, Undergraduate Nurses, Supervisors and those above the rank of Supervisor, as well as those who have managerial functions or are employed in a confidential capacity in matters relating to lab-

our relations as defined in The Labour Relations Act, R.S.O. 1970 c. 232 and amendments thereto and employees covered by any other existing collective agreement.” (146 employees in the unit).

1590-77-R: Canadian Union of Public Employees (Applicant) v. The Manitoulin Centennial Manor (Respondent).

Unit: “all employees of The Manitoulin Centennial Manor, Little Current, Ontario, in the District of Manitoulin, save and except Professional Medical Staff, Graduate Nursing Staff, Assistant Administrator and persons above the rank of Assistant Administrator, Office Staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (31 employees in the unit).

1594-77-R: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Courtesy Disposal Service Inc. (Respondent).

Unit: “all employees of the respondent at Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and persons employed for not more than twenty-four hours per week and students employed during the school vacation period.” (4 employees in the unit).

1595-77-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW (Applicant) v. Magna-Cote (Division of Magna International Inc.) (Respondent).

Unit: “all employees of Magna-Cote (Division of Magna International Inc.) in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and technical staff.” (00 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. February).

1598-77-R: Service Employees Union, Local 204, A.F.L.-C.I.O., C.L.C. (Applicant) v. Medi Park Lodges Inc. carrying on business as Oakwood Park Lodge (Respondent).

Unit: “all employees who are regularly employed for not more than 24 hours per week by Medi Park Lodges Inc. at its nursing home at Oakwood Park Lodge, Niagara Falls, save and except professional medical staff, registered nurses, graduate nurses, undergraduate nurses, supervisors and persons above the rank of supervisor, and office staff.” (17 employees in the unit).

1609-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Lumid Developments Ltd. (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at 390 Dawes Road, Scarborough, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (2 employees in the unit).

1610-77-R: Teamsters Local 879 Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. National Socket Screw Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at Beamsville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (23 employees in the unit).

1614-77-R: Labourers' International Union of North America, Local 493 (Applicant) v. Janin Building & Civil Works Ltd., General Contractors (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Townships of Carling, Ferguson, McKellar, McDougall, Foley, Christie, Cowper and Hagerman in the District of Parry Sound, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1623-77-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Dorset Food Products Ltd. (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, laboratory staff, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1633-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nicholls-Radtke and Associates Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1634-77-R: Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local 124, Ottawa-Hull (Applicant) v. Fil Drywall & Painting Inc. (Respondent).

Unit: "all drywall tapers employed by the respondent in the United Counties Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1638-77-R: Canadian Transportation Workers Union, No. 188, National Council of Canadian Labour (Applicant) v. Bill Thompson Transport Limited (Respondent).

Unit: "all employees of the respondent working in or out of the respondent's terminal at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, maintenance workers, office and sales staff, and persons regularly employed for not more than twenty-four hours per week." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1644-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 190 (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 5 Shady Golfway Apartment Building and Recreation Centre, Don Mills, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit).

1658-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pine Vale Construction Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York

and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1670-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Bramalea Carpentry Associates (Respondent).

Unit: "all construction labourers employed by the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1682-77-R: Canadian Union of Public Employees (Applicant) v. London & Middlesex County Roman Catholic Separate School Board (Respondent).

Unit: "all teacher assistants and library assistants employed by the London & Middlesex County Roman Catholic Separate School Board, in the City of London." (30 employees in the unit).

1685-77-R: Christian Labour Association of Canada (Applicant) v. W. Jack Harrison Painting & Decorating (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

1703-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cowas Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1704-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Hat Erection Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above of non-working foreman." (3 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1438-77-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. The Great

War Memorial Hospital of Perth District (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener).

Unit: "all stationary engineers and persons primarily engaged as their helpers and other categories employed in the maintenance of the physical plant, employed by the Great War Memorial Hospital of Perth District, Perth, Ontario, save and except the maintenance supervisor and persons regularly employed for not more than 24 hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	1	

1513-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Massey-Ferguson Industries Limited, Toronto (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all Stationary Engineers and helpers at the Toronto factory (915 King St. West) of the respondent, save and except Chief Engineer and Assistant Chief Engineer and persons covered by subsisting collective agreement between the respondent and UAW, and International Association of Professional and Technical Engineers, Local #164 (35 Draftsmen in Unit)." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener	0	

1606-77-R: Canadian Chemical Workers Union (Applicant) v. Block Drug Company (Canada) Limited (Respondent) v. International Chemical Workers Union and its Local 897 (Intervener).

Unit: "all employees of the respondent located in Metropolitan Toronto, Ontario save and except foremen and persons above the rank of foreman, office staff, sales department staff and students employed during the school vacation period." (69 employees in the unit).

Number of names of persons on list as originally prepared by employer		69
Number of persons who cast ballots	63	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	61	
Number of ballots marked in favour of intervener	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0926-77-R: International Ladies' Garment Workers' Union (Applicant) v. Singer Company of Canada Limited (Respondent). (16 employees).

1537-77-R: Graphic Arts International Union, Local 542 (Applicant) v. Paris Graphic Industry Trade Services Limited (Respondent). (111 employees).

1567-77-R: Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for The Mentally Retarded (Respondent) v. Group of Employees (Objectors). (111 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1440-77-R: Canadian Textile & Chemical Union (Applicant) v. Dorothea Knitting Mills Limited (Respondent).

Voting Constituency: "All the employees of the Respondent in Metropolitan Toronto save and except the chief engineer, foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (173 employees).

Number of names of persons on list as originally prepared by employer		166
Number of persons who cast ballots	163	
Number of spoiled ballots	5	
Number of ballots marked in favour of applicant	49	
Number of ballots marked against applicant	109	

1477-77-R: International Union of Electrical, Radio and Machine Workers, AFL, CIO, CLC (Applicant) v. GTE Automatic Electric (Canada) Ltd. (Respondent).

Voting Constituency: "All office, clerical and technical employees of the respondent at Brockville save and except assistant foremen and assistant supervisors, persons above the rank of assistant foreman and assistant supervisor, outside service personnel, specialists, purchasing agents, salesmen and sales representatives, nurses and nursing assistants, time study technicians, confidential secretaries and stenographers, designated accounting and payroll clerks, financial analysts, financial co-ordinators, budget co-ordinators, typing pool co-ordinators, graduate engineers, factory skills instructors, auxillary machine operators, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students hired on a co-operative training basis with schools and universities, trainees on a graduate training programme and employees covered by a subsisting collective agreement with the International Union of Electrical Radio and Machine Workers, AFL, CIO, CLC, and its Local 526." (358 employees).

Number of names of persons on list as originally prepared by employer		355
Number of persons who cast ballots	331	
Ballots segregated and not counted	4	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	86	
Number of ballots marked against applicant	238	

1596-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Queen Elizabeth Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Voting Constituency: "All stationary engineers and persons primarily engaged as their helpers employed by the Hospital in its boiler room at its hospital, 130 Dunn Avenue, Toronto, save and except

the Assistant Chief Engineer and persons above the rank of Assistant Chief Engineer.” (5 employees).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	2	

Certification Dismissed Subsequent to Post-Hearing Vote

0755-77-R: The Sheet Metal Workers International Association, Local Union #562 (Applicant) v. Kenwood Mechanicals Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all sheet Metal Workers and Sheet Metal Workers Apprentices in the employ of the respondent in the County of Wellington board area 7, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Ballots segregated and not counted	0	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against the applicant	6	

1413-77-R: Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Metal Recovery Industries Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of Metal Recovery Industries Ltd. in Hamilton, Ontario, save and except foremen, persons above the rank of foreman, maintenance co-ordinator, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods.” (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	20	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	11	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1579-77-R: Canadian Union of Public Employees (Applicant) v. Kingston General Hospital Women's Aid Society (Respondent). (8 employees).

1591-77-R: United Steelworkers of America (Applicant) v. Standard Oxygen (Ontario) Limited (Respondent). (6 employees).

1626-77-R: United Steelworkers of America (Applicant) v. Trent Metals Limited (Respondent). (45 employees).

1697-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. McPeople Limited (Respondent). (2 employees).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1607-77-U: Gerald Blais (Complainant) v. Algoma Contractors Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1241-77-R: Arthur Bieman, on behalf of a group of employees (Applicant) v. Canadian Union of United Brewery-Flour-Cereal-Soft Drink and Distillery Workers (Respondent) v. Kitchener Beverages Limited (Intervener) v. Group of Employees (Objectors). (*Granted*).

Unit: "all employees of the Intervener engaged in sales and telephone sales at its premises at 310 Fairway Road South, Kitchener, Ontario." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		5
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	5	

1264-77-R: Frank Sarcinella (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (Respondent) v. Dad's Cookies Ltd. (Intervener). (*Granted*).

Unit: "all employees of Dad's Cookies Ltd. in the Borough of Scarborough in the Municipality of Metropolitan Toronto, save and except foremen and foreladies, office, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (59 employees in the unit).

Number of names of persons on list as originally prepared by employer		56
Number of persons who cast ballots		56
Number of ballots marked in favour of respondent	22	
Number of ballots marked against of respondent	34	

1356-77-R: Steve Pukljak (Applicant) v. International Chemical Workers Union, Local 424 (Respondent) v. Kleen-Stik Products Limited (Intervener). (*Granted*).

Unit: "all employees of Kleen-Stik Products Limited, Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (85 employees in the unit).

Number of names of persons on list as originally prepared by employer		84
Number of persons who cast ballots		83
Number of ballots marked in favour of Respondent	41	
Number of ballots marked against Respondent	42	

1392-77-R: Linda Toronyi (Applicant) v. Hotel and Restaurant Employees' Union, Local 743 (Respondent). (145 employees). (*Dismissed*).

1468-77-R: Part-Time Employees of Manitoulin Centennial Manor Local 663 Little Current, Ontario. Mrs. Nola Golder (Applicant) v. Ontario Public Services Employees Union (Respondent). (*Granted*).

Unit: "all employees who are regularly employed for not more than twenty-four (24) hours per week in the District of Manitoulin Home for the Aged save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nursing staff, undergraduate nurses and office and clerical staff." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots		17
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	16	

1556-76-R: McGraw Edison Ltd. (Employees) (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent). (5 employees). (*Granted*).

1570-77-R: George Cunningham (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2486 (Respondent). (6 employees). (*Dismissed*).

1601-77-R: Trizec Equities Ltd. (Security Guards) (Applicant) v. International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. Trizec Equities Ltd. (Intervener). (9 employees). (*Granted*).

1631-77-R: Michel Corbeil, Robert Church, and Michael P. MacDonald (Applicants) v. Teamsters Union Local 938 (Respondent) v. Sam Butti Wholesale, Division of Allind Distributors Limited (Intervener). (5 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1678-77-U: Dewar Insulations Inc. (Applicant) v. Sheet Metal Workers International Association Local 537, James Fletcher, John Aitken et al (See schedule "A" attached hereto) (Respondents). (*Withdrawn*).

1775-77-U: Boart Hardmetals (Canada) Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implements Workers of America (U.A.W.) and its Local 1256, Frank Kenny, Wolfgang Hock, James Steel, John Phillips, John Seddon, James Coutermann and Clifford Hicks (Respondents). (*Granted*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1161-77-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. MacDonalds Consolidated Limited (Respondent). (*Dismissed*).

APPLICATION FOR CONSENT TO PROSECUTE (HOSPITAL ARBITRATION ACT)

64-77-P.H.: Boot and Shoe Workers' Union Affiliated with Canadian Labour Congress, AFL-CIO (Applicant) v. Hillsdale Nursing Home John Freeborn, Administrator (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0286-77-U: Graduate Assistants' Association (Complainant) v. Carleton University (Respondent). (*Granted*).

1191-77-U: International Woodworkers of America (Complainant) v. Don Valley Lumber Company, A Division of Solmill Building Supplies Limited (Respondent). (*Withdrawn*).

1215-77-U: Oscar Larocque (Complainant) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915, and Foster Wheeler Limited (Respondents). (*Dismissed*).

1350-77-U: Boot & Shoe Workers' Union, CLC, AFL-CIO (Complainant) v. Hillsdale Nursing Home (Respondent). (*Withdrawn*).

1367-77-U: Stephen Gormley (Complainant) v. Canadian Union of Public Employees, Toronto Civic Employees Local Union No. 43 and The Municipality of Metropolitan Toronto (Respondents). (*Dismissed*).

1471-77-U: Canadian Chemical Workers Union (Complainant) v. H. L. Blachford Limited (Respondent). (*Withdrawn*).

1576-77-U: International Association of Machinists, Lodge #1936 (Complainant) v. Ladish Co. of Canada Ltd. (Respondent). (*Withdrawn*).

1597-77-U: Pharmacists and Professional Employees Association, Local 1976, Chartered by Retail Clerks International Union, CLC, AFL, CIO (Complainant) v. Kentwood Nursing Home Limited (Respondent). (*Withdrawn*).

1604-77-U: Oil, Chemical & Atomic Workers International Union (Complainant) v. Battenfeld Grease (Canada) Ltd. (Respondent). (*Withdrawn*).

1615-77-U: Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel & Restaurant Employees and Bartenders International Union, AFL, CIO, CLC (Complainant) v. 356554 Ontario Limited, carrying on business as the Richmond Inn (Respondent). (*Withdrawn*).

1624-77-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by Retail Clerks International Union, CLC, AFL-CIO (Complainant) v. Kentwood Nursing Home Limited (Respondent). (*Withdrawn*).

1625-77-U: Pharmacists and Professional Employees Association, Local 1976 Chartered by Retail Clerks International Union, CLC, AFL, CIO (Complainant) v. Kentwood Nursing Home Limited (Respondent).

1628-77-U: John J. Burns (Complainant) v. Frank Cortese (Respondent). (*Withdrawn*).

1629-77-U: William McClue (Complainant) v. The City of Hamilton (Respondent). (*Withdrawn*).

1642-77-U: Canadian Union of Public Employees (Complainant) v. Kingston General Hospital Women's Aid Society and Kingston General Hospital (Respondents). (*Withdrawn*).

1647-77-U: Ottawa Newspaper Guild, Local 205 (Complainant) v. The Journal Publishing Company of Ottawa Limited (Respondent). (*Withdrawn*).

1648-77-U: United Steelworkers of America (Complainant) v. Canadian Racing Plate (Respondent). (*Withdrawn*).

1675-77-U: Canadian Union of Public Employees (Complainant) v. Art Gallery of Ontario (Respondent). (*Withdrawn*).

1690-77-U: United Steelworkers of America (Complainant) v. Canadian Racing Plate (Respondent). (*Withdrawn*).

1779-77-U: United Steelworkers of America (Complainant) v. National Welding Supply (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55

1170-77-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. The Electrical Contractors Association of Toronto, Base Electric Company Limited, Tron Electric Company Limited, Virgo Electric Limited, Flag Electric Company Limited, Code Electric Company Limited, Weston Electric Limited (Respondents). (*Granted*).

1325-77-R: United Brotherhood of Carpenters & Joiners of America, Local 2679, affiliated with Carpenter's District Council of Toronto and Vicinity (Applicant) v. Anco Store Fixtures, a Division of 363015 Ontario Limited (Respondent) v. United Steelworkers of America (Intervener). (*Granted*).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and sales staff and students employed during the school vacation period."

Number of names of persons on revised voters' list		64
Number of persons who cast ballots	51	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener	35	

1486-77-R: Local Union 221 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Grenville Plumbing & Heating Limited and Toshack Brothers (Prescott) Limited (Respondents). (*Granted*).

1636-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Mississauga Hydro-Electric Commission (Respondent) v. Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union Local 1000 (Intervener). (*Granted*).

JURISDICTIONAL DISPUTE

1669-77-JD: Crestlawn Mechanical Contractor Canada Limited (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 and Matthew Baker (Respondents). (*Direction*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1053-77-M: International Association of Machinists & Aerospace Workers Local 1863 (Applicant) v. Champion Road Machinery Limited (Respondent).

1140-77-M: The Corporation of the Town of Fort Erie (Employer) v. Canadian Union of Public Employees Local 714 (Trade Union). (*Withdrawn*).

1397-77-M: The Corporation of the Town of Iroquois Falls (Employer) v. The Canadian Union of Public Employees and its Local 259 (Trade Union).

APPLICATIONS UNDER SECTION 112A

0618-77-M: Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Normand & Fleming Ltd. (Respondent).

1042-77-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Rindfleisch Contracting Limited, Centre Construction, and The Masonry Industry Employers Council of Ontario (Respondents). (*Withdrawn*).

1134-77-M: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Electrical Contractors Association of Toronto, Tron Electric Co., Base Electric Co. Ltd., Flag Electric Co. Ltd., Weston Electric Ltd., Code Electric Co. Ltd., Virgo Electric Ltd. (Respondents). (*Granted*).

1209-77-M: Local 787, Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Cond-Air Company Limited (Respondent). (*Withdrawn*).

1210-77-M: Local 787, Refrigeration Installation and Service Mechanics and Apprentices of the

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Cond-Air Company Limited (Respondent). (*Withdrawn*).

1254-77-M: Sheet Metal Workers' International Association Local Union #285 (Applicant) v. Celsius Air Systems and Residential Sheet Metal Contractors Organization (Respondents). (*Withdrawn*).

1386-77-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. The Masonry Industry Employers Council of Ontario, Sarnia Masonry Construction and Ivan Prelogar Construction Ltd. (Respondents). (*Granted*).

1525-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Toronto and District Excavators Association and its Affiliate, Petrisan Construction Limited (Respondent). (*Granted*).

1563-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Markham Plumbing and Heating and the Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1564-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Glen Mechanical Contractors Ltd. and the Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1565-77-M: United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. (1) Globo Plumbing Ltd. (2) The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors of Toronto (Respondent). (*Granted*).

1599-77-M: Christian Labour Association of Canada (Applicant) v. Crown Electric, owned and operated by Crowle Electrical Ltd. (Respondent). (*Withdrawn*).

1602-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Port Processing Ltd. and The Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1603-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Main Contractors Ltd. and the Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1613-77-M: Toronto Building and Construction Trades Council and International Brotherhood of Painters and Allied Trades, Glaziers' Local Union 1819 (Applicants) v. Holscot Construction Limited and Architectural Glass and Metal Contractors Association (Respondents).

1621-77-M: Local Union 221 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. The Mechanical Contractors' Association of Kingston, Grenville Plumbing & Heating Limited and Toshack Brothers (Prescott) Limited (Respondent). (*Granted*).

1672-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Sewer and Watermain Contractors' Association (Respondent). (*Withdrawn*).

1674-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Road Builders' Association (Respondent). (*Withdrawn*).

1686-77-M: Labourers' International Union of North America, Local 527 (Applicant) v. Joe Arban Contracting Limited (Respondent). (*Withdrawn*).

1687-77-M: Labourers' International Union of North America, Local 527 (Applicant) v. Normand and Fleming Limited (Respondent). (*Withdrawn*).

1695-77-M: International Union of Elevator Constructors Local 90 (Applicant) v. Northern Elevator Limited (Respondent). (*Withdrawn*).

1739-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. A. R. G. Contracting Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1323-77-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. 3595 Keele Ltd., carrying on business as Elm Tree Nursing Home (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

0307-77-U: John Farrugia (Complainant) v. Ontario Public Service Employees Union, Local 240, James M. Allen and R. Alen Dalsto (Respondents). (*Request Denied*).

0620-76-U: Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 141 (Applicant) v. Harry Woods Transport Limited (Respondent). (*Section 83*). (*Request Denied*).

1269-76-M: Super - X Drugs Limited (Employer) v. Retail Clerks International Association (Trade Union) v. Morden B. Niren and Ardon Pharmacy Limited (Parties Added by the Board). (*Request Denied*).

1433-77-M: The Ottawa Carlton Regional Health Unit (Employer) v. Civic Institute of Professional Personnel of Ottawa Carlton (Trade Union). (*Request Denied*).

1434-77-M: Haldimand-Norfolk Regional Health Unit (Employer) v. Ontario Nurses' Association (Trade Union). (*Section 96*). (*Request Denied*).



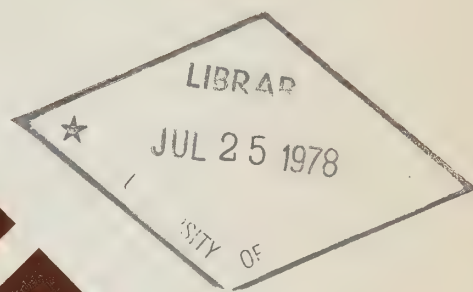
Labour
Relations Board

Ontario

282

054

Decisions April 78



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
A. GRIBBEN
A. HERSHKOVITZ
O. HODGES
R.D. JOYCE
F. KEAN
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
W.F. RUTHERFORD
H. SIMON
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYNSLEY

Solicitor R.O. MACDOWELL

Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

CASES REPORTED

Academy of Medicine, Toronto Call Answering Service, Re Communications Workers of Canada	375
Adams, S.D. Welded Products Limited, Re United Steelworkers of America	353
Bell Shirt Company Limited, The, Re United Garment Workers of America	373
Burke, M.G. Investments Ltd., Re Local Union 1687 of the International Brotherhood of Electrical Workers And Sudbury Electrical Contractors Association (S.E.C.A.)	348
Canadian General Electric Company Limited, Re International Federation of Professional and Technical Engineers, AFLCIO-CLC And International Union of Electrical Workers, and its Local 599	384
Crown Electric, owned and operated by Crowle Electrical Ltd., Re Christian Labour Association of Canada	344
McKee, Arthur G. & Company of Canada Ltd., Re International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721	351
Municipality of Casimir, Jennings & Appleby, Re Labourers' International Local 493	369
Ontario Hydro, Re Ontario Allied Construction Trades Council and Electrical Power Systems Construction Association	331
Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 124, Ottawa-Hull, The, Re Labourers' International Local 527 ..	362
Rondar Services Limited, Re International Brotherhood of Electrical Workers, Local 105 And Group of Employees	379
York Central Hospital, Re Canadian Union of Operating Engineers & General Workers And Employee	382

INDEX OF CASES

- Arbitration – Section 112a – Effect of written settlement of grievance – Whether Board will entertain evidence to contradict plain meaning of settlement – Whether new or original grievance barred.
- CHRISTIAN LABOUR ASSOCIATION OF CANADA v. CROWN ELECTRIC
owned and operated by CROWLE ELECTRICAL LTD 344
- Arbitration – Section 112a – Management unilaterally instituting compulsory retirement at age 70 – Collective agreement silent respecting retirement and management rights – Whether termination of grievor “justified”
- ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL v. ELECTRICAL
POWER SYSTEMS CONSTRUCTION ASSOCIATION and ONTARIO
HYDRO 331
- Arbitration – Section 112a – Parties – Status of individual employer where agreement is between union and accredited employer association – Whether Board has jurisdiction to adjudicate dispute respecting electrical work performed on chattels and maintenance work – Whether such work is in the construction industry
- LOCAL UNION 1687 OF THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS v. SUDBURY ELECTRICAL CONTRACTORS
ASSOCIATION (S.E.C.A.) and M.G. BURKE INVESTMENTS LTD. 348
- Arbitration – Section 112a – Parties – Status of individual employer where collective agreement is between union and accredited employer association
- INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND OR-
NAMENTAL IRONWORKERS, LOCAL UNION 721 v. ARTHUR G. McKEE
& COMPANY OF CANADA LTD. 351
- Certification – Bargaining Unit – Union already representing operating engineers craft unit and seeking additional unit of maintenance employees – Remainder of service employees unrepresented – Whether proposed unit appropriate
- CANADIAN UNION OF OPERATING ENGINEERS & GENERAL WORK-
ERS v. YORK CENTRAL HOSPITAL AND EMPLOYEE 382
- Certification – Employee – Effect of Board decision on managerial status made 24 years ago – Whether Board bound by previous decision – Whether res judicata
- INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL
ENGINEERS, AFLCIO – CLC v. CANADIAN GENERAL ELECTRIC COM-
PANY LIMITED and INTERNATIONAL UNION OF ELECTRICAL WORK-
ERS and its Local 599 384
- Certification – Interference in Trade Unions – Bargaining unit – Employee – Whether employee-directors of company are managerial if they do not exercise managerial authority over fellow employees – Effect of involvement of employee-directors in organizing campaign – Whether employee-directors must be excluded from the bargaining unit
- UNITED STEELWORKERS OF AMERICA v. S.D. ADAMS WELDED PROD-
UCTS LIMITED 353

Certification – Jurisdiction – Constitutional Law – Employer engaged in repair and maintenance of equipment used by federal government facility involved in testing pollution in inland waters – Whether employees within Provincial jurisdiction	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 105 v. RONDAR SERVICES LIMITED and GROUP OF EMPLOYEES	379
S. 79 – Effect of pre-existing policy respecting payment of sick leave benefits – Failure to pay benefits during s. 70 freeze period – Whether breach of s. 70	
UNITED GARMENT WORKERS OF AMERICA v. THE BELL SHIRT COMPANY LIMITED	373
S. 79 – Initiation of wage increase during s. 70 freeze period without approval of municipal council – Whether wage increase granted “in error” can be revoked	
LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493 v. MUNICIPALITY OF CASIMIR, JENNINGS & APPLEBY	369
S. 79 – Interference with Trade Union – Employer closing down part of its operation in response to trade union organizing campaign – Board ordering payment of damages to employees and trade union – Measure of damages	
COMMUNICATIONS WORKERS OF CANADA v. ACADEMY OF MEDICINE, TORONTO CALL ANSWERING SERVICE	375
Termination – Collective agreement – Whether collective agreement void by reason of employer support of union – Whether union represented majority of employees when agreement entered into	
LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 v. THE OPERATIVE PLASTERERS’ AND CEMENT MASONS’ INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL NO. 124, OTTAWA-HULL	362

1137-77-M Ontario Allied Construction Trades Council, (Applicant), v. Electrical Power Systems Construction Association and **Ontario Hydro**, (Respondents).

Arbitration – Section 112a – Management unilaterally instituting compulsory retirement policy at age 70 – collective agreement silent respecting retirement and management rights – Whether termination of grievor “unjustified”

BEFORE: Donald D. Carter, Chairman, and Board Members O. Hodges and W.H. Wightman.

APPEARANCES: *A.M. Minsky for the applicant; H.A. Beresford, W. O'Neill, J. Walker and E.B. Eshpeter for the respondents.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER W.H. WIGHTMAN; April 21, 1978

1. This is a reference brought under section 112a of the *Labour Relations Act* and relating to a grievance filed by Theo Van Iderstine. This grievance arose out of the compulsory retirement of the grievor on June 30, 1977, shortly after he reached the age of 70. The grievor seeks to be reinstated in the employ of the respondent Ontario Hydro, and claims damages for the loss of earnings and other employment benefits resulting from this compulsory retirement.

2. The grievor had been employed by the respondent as a construction labourer for a total period of just under nine years. During his employment with the respondent he was a member of the Labourers International Union of North America. At age 60 the grievor was first hired by the respondent to do heavy construction work on the Pickering A generation station project. His employment at this project extended from November 9, 1971 to November 28, 1973, at which point he was laid off. The grievor was brought back on October 1, 1974 to work on the Pickering B generation station project, and worked there as a construction labourer until June 30, 1977, the date of his retirement by the respondent.

3. The amount of notice of his retirement given to the grievor is not entirely clear. Elton Eshpeter, the assistant personnel officer at the Pickering B generation project recalled discussing the retirement with the grievor almost twelve months prior to the date of the retirement. Eshpeter was not certain as to who raised the matter of retirement, but did indicate that it was his impression that the grievor was aware of the respondent's policy of compulsory retirement at age 70 at that time. The grievor, on the other hand, testified that he did not recall discussing the respondent's compulsory retirement policy with Eshpeter until some three months prior to his actual retirement, and that the matter had been raised by Eshpeter on that occasion. Despite the conflicting testimony as to when this discussion took place, the Board is convinced that both witnesses were honestly attempting to recall the details of a meeting which become somewhat blurred because of the passage of time. Certainly, from the evidence, it is possible for the Board to draw the conclusion that the grievor had informal notice of his impending retirement at least three months before it occurred.

4. Formal notice of the respondent's intention to retire the grievor, who was gener-

ally known as Shorty, was given in a letter from the respondent, dated June 10, 1977. The text of that letter reads as follows:

“Further to verbal discussions that you have had previously with Mr. E.B. Eshpeter, we wish to congratulate you on your seventieth birthday, which is approaching on June 21st. We understand that you are somewhat reluctant to retire from your employment with Ontario Hydro on that date. While we admire your dedication and desire to prolong your contribution to the building of the Pickering G.S. “B” project, our official policy will not allow us to retain any employees beyond the age of seventy.

You will, therefore, kindly accept this letter as official notice that your employment with Ontario Hydro will be terminated as of 4:30 p.m. on Thursday, June 30, 1977.

We want to thank you, Shorty, for your nine years of loyal service at both Pickering “A” and Pickering “B” projects, and we trust that your good health will continue for many years to come. This will allow you to fully employ your skills in your favorite hobby of fishing.

Our best wishes to you, Shorty, in the years ahead.”

5. That we are now faced with this reference testifies to the fact that the grievor was not content to employ his skills at fishing on a full-time basis. At the hearing the grievor made it quite clear that he enjoyed his work and wished to continue in his job as long as he was healthy. From all appearances the grievor is a vigorous and robust person still capable of doing the work required by his former job. Eshpeter, in his testimony, rated the grievor as a good worker and satisfactory employee – in respect of work performance, attendance, and punctuality, the grievor was average; while in respect of enthusiasm and co-operation he was above average. The reason for the grievor’s retirement flowed from the respondent’s policy of mandatory retirement at age 70.

6. The policy of compulsory retirement at age 70 was extended to construction employees in 1971. Prior to that time the respondent had not been taking a uniform approach toward compulsory retirement. Employees covered by the Ontario Hydro Pension Plan were normally retired at age 65, but employees whose skills were needed by the respondent might be extended until they reached age 70 but not beyond that age. A substantial number of casual employees, or construction employees, however, were not covered by the respondent’s pension plan and not subject to the retirement ages stipulated in that plan. The grievor was among that group, being covered instead by a union pension plan to which the respondent made contributions. This pension plan, although not providing for compulsory retirement, did require at least ten years service before even a reduced pension was payable. By 1971, there were 55 casual employees over age 65 and 2 casual employees over age 70 in the respondent’s employ.

7. To clarify its retirement policy, the respondent, through its committee of general managers, decided that casual employees could be employed up to age 70, provided that they were performing the job satisfactorily, but that their employment could not continue beyond age 70. A memorandum outlining this policy was sent to all personnel officers on

June 22, 1971. There was no evidence, however, that the grievor's union received a copy of this memorandum, nor is there any evidence that any general notice of this policy was given to employees. On the other hand, the evidence indicated that, since 1971, the mandatory policy of retirement at age 70 has been applied uniformly to all of the respondent's employees, including casual employees.

8. This case raises the difficult issue of the extent to which a compulsory retirement policy can be the subject of arbitral review. The respondent argued that it had a general right to implement a retirement policy, subject only to any express provisions in the collective agreement restricting that right and to the implied qualification that such a policy not be exercised in bad faith. The applicant took a much different tack, arguing that the language of the collective agreement in this case was sufficiently broad to require the respondent to justify the retirement in the same manner as it must justify a discharge. A termination of employment based on age alone, according to counsel for the applicant, did not meet the standard required by the collective agreement and the grievance must be allowed.

9. The applicable collective agreement is the one made between the Electrical Powers Systems Construction Association and the Ontario Allied Construction Trades Council. Article 13.2 of that agreement dealing with termination provides:

13.2 ON TERMINATION

- (a) An employee who voluntarily terminates his employment will be provided his final pay on the next regular pay day.
- (b) An employee who is laid off will have his final pay mailed to his regular residence within three working days from termination. This does not preclude an employee being paid his final pay, on the job, prior to the three-day period.
- (c) An employee who is discharged shall be provided with his final pay immediately if the Employer's pay facilities are on site or as per 13.2 (b) if the Employer's pay facilities are not on site.
- (d) Employers will provide one hour's notice of layoff or one hour's pay in lieu of notice to employees who are to be laid off.
- (e) When an employee is laid off, he will be paid for a reasonable amount of time by the Employer if he is required to travel or wait unduly before he receives his final pay.

Article 28 of the agreement sets out the grievance procedure agreed to by the parties and, more specifically, article 28.7 provides:

28.7 Alleged unjustified termination, discharge, suspension or disciplinary action may be grieved beginning at First Step.

Arbitration is provided for in article 29 and the powers of an arbitration board constituted under the provision are spelled out in article 29.2:

29.2 The arbitration board shall have no power to add to or subtract from or modify any of the terms of this Agreement. The arbitration board shall not substitute its discretion for that of the parties except where the board determines that an employee has been discharged or otherwise disciplined for cause when this Agreement does not contain a specific penalty for the infraction that is the subject matter of the arbitration. In such cases, the arbitration board may substitute such other penalty for the discharge or discipline as to the arbitration board seems just and reasonable in all circumstances. The arbitration board shall not exercise any responsibility or function of the parties. The arbitration board shall not deal with any matter not contained in the original statement of grievance filed by the party referring the matter to arbitration.

10. This matter arises under section 112a of the *Labour Relations Act* so that this Board's authority is derived from a statutory source rather than from the agreement of the parties. The process established by section 112a, however, is one analogous to grievance arbitration established by a collective agreement. As in the case of grievance arbitration, it is disputes relating to the interpretation, application, administration or alleged violation of a collective agreement, including the matter of arbitrability that are heard and determined by this Board under section 112a. Given this concurrency of jurisdiction, there is no question that this Board must look primarily to the language of the collective agreement when determining a section 112a referral. But, just as an arbitrator must at times take into account relevant public statutes [see *United Steelworkers of America, Local 2994 v. Galt Metal Industries Ltd.* (1974), 74 CLLC ¶14,220 (S.C.C.)], this Board must also construe collective agreements in the light of applicable statutory policy. Where the relevant statute is the *Labour Relations Act*, for which we have a primary responsibility, it becomes even more apparent that the Board has a responsibility to ensure that our interpretation of the collective agreement is consistent with the policy established by the Act. With these considerations in mind we must determine the scope of our authority to review the compulsory retirement policy established by the respondent, and its application to the grievor.

11. The limits of our authority to review management's decision to retire an employee require some exploration. There appears to be no question that after the decision of the Supreme Court of Canada in *Bell Canada v. Office and Professional Employees' International Union, Local 131* (1973), 37 D.L.R. (3d) 561, a retirement, in the absence of specific language to the contrary, cannot be treated by an arbitrator in the same manner as a discharge. As the majority decision of the Court stated (at p. 565):

Article 8 of the collective agreement reading, "The Company may dismiss or suspend an employee for sufficient and reasonable cause", cannot possibly be read as "dismiss, or suspend, or retire on pension". Until the words retire on pension appear in article 8 of the collective agreement, there can be no basis for the arbitrator's decision. Dismissal, suspension and retirement on pension are three different and distinct concepts.

12. The *Bell Canada* decision, however, does not support a generalization that a retirement can never be the subject of arbitral review. What this decision appears to be saying is that retirement cannot be equated with a simple discharge, leaving no doubt that the "just cause" restriction upon an employer's right to discharge does not define the scope of arbi-

tral review of retirement. The extent of arbitral review of this type of severance of employment, therefore, must be determined by reference to considerations other than those applying to the ordinary discharge.

13. The language of the collective agreement before us gives some indication of the scope of arbitral review of retirement intended by these parties. This language can be contrasted with that considered by the Supreme Court of Canada in *Bell Canada*. Instead of referring only to dismissal or suspension for sufficient and reasonable cause, article 28.7 is much wider in its scope encompassing "alleged unjustified termination, discharge, suspension, or disciplinary action". The clear implication of this language is that severances of employment other than discharges could also be the subject of a grievance.

14. Is this implication supported by language found elsewhere in the collective agreement? Reference must be made to article 29.2. The language used in this provision, although somewhat different from that found in section 37(8) of the *Labour Relations Act*, appears to effect the same result allowing an arbitration board, in the absence of specific penalties being stipulated in the collective agreement, to substitute some other penalty for a discharge or discipline imposed by the employer. The absence of any reference to termination in this provision again suggests that the parties intended the term "termination" to cover severances of employment other than through discharge. This form of wording would also suggest that the parties intended to treat such severances of employment differently than discharges in that the discretion of an arbitration board would be more curtailed when dealing with such other terminations of employment.

15. The question remains whether the term "termination", although wider in scope than "discharge or dismissal", is sufficiently wide to include a severance of employment through retirement. Counsel for the respondent argued that article 13.2 defined the latitude of "termination", confining it to the situation dealt with in that provision – voluntary termination, lay-offs, discharges. This provision, however, simply specifies the procedure for payment in these three situations and, in addition, requires a one-hour notice of lay-off. The fact that discharge is one of the three situations referred to in article 13.2 suggests that the parties were not attempting in this provision to define the extent of arbitral review of severances of employment other than by discharge but were merely establishing specific procedures for those three particular situations. The governing provision, in our view, is article 28.7 in which the term "termination" is in no way qualified. In the context of this collective agreement, therefore, we consider "termination" to be a term of sufficient width to include compulsory retirement.

16. To summarize at this point, our conclusion is that the language of the collective agreement does contemplate that a termination by compulsory retirement can be the subject of a grievance, allowing an arbitration board to determine whether it was justified. It is clear, however, that the parties did not intend that such determinations would be subject to the same kind of arbitral review as would a discharge. Our determination of this grievance must take into account the special considerations that surround the issue of compulsory retirement policies, and cannot be confined to the normal considerations applied by arbitrators when dealing with a standard discharge. This approach, in our view, recognizes the reality of retirement – it is a termination of employment but its special nature requires a different yardstick to measure its justification.

18. In what circumstances is a compulsory retirement unjustified? The question is a difficult one to answer. The standards against which compulsory retirement is to be measured do not emerge clearly from the arbitral jurisprudence. One theme found in a number of cases where a compulsory retirement has been upheld is that there is a clear distinction between retirement and discharge, so that an employer does not have to justify a retirement in the same manner as a discharge. See, for example, *Canadian Westinghouse* (1953), 3 L.A.C. 12 (Anderson); *Rexall Drug Co.* (1953), 4 L.A.C. 1468 (Laskin); *Libby, McNeill & Libby Ltd.* (1954), 5 L.A.C. 2130 (Roach); *Canadian Car & Foundry Co. Ltd.* (1955), 6 L.A.C. 161 (Curtis); *B.C. Forest Products Ltd.* (1958), 8 L.A.C. 153 (Carrothers); *Perth County Board of Education* (1972), 24 L.A.C. 91 (Hinnegan); *General Freezer Ltd.* (1974), 7 L.A.C. (2d) 365 (O'Shea). For a contrary view, see *Bell Canada* (1971), unreported (Weiler). This proposition standing by itself says little about the circumstances where a retirement would not be justified.

19. Another thread running through a number of arbitration awards upholding a compulsory retirement is that management has the right to impose compulsory retirement so long as that right is not restricted by the language of the collective agreement. This approach finds judicial support in *Canadian Car & Foundry Co. Ltd. v. Dinham* (1959), 21 D.L.R. (2d) 273 (S.C.C.) and in *Re Sandwich, Windsor and Amherstberg Railway Co. et al* (1961), 26 D.L.R. (2d) 704 (Ont. C.A.). Arbitration decisions where this approach can be found include *Canadian Car & Foundry Co. Ltd.*, *supra*; *Canadian Forest Products* (1961) 12 L.A.C. 25 (Wilson); *Ontario Malleable Iron Co. Ltd.* (1967), 19 L.A.C. 1 (Palmer); *MacMillan Bloedel Industries Ltd.* (1971), 21 L.A.C. 148 (Bird). This proposition, unfortunately, leaves unanswered the questions of what form of language in a collective agreement would restrict management's right to retire, and whether this right to retire is subject to any implied qualifications.

20. A third line of thought that can be found in a number of arbitration awards is that management's right to retire cannot be exercised in an arbitrary, discriminatory, or unreasonable manner. This qualification appears to have its genesis in *Rexall Drug Co.*, *supra*, where the board stated, at p. 1470:

"...In the Board's view, the right of the Company to retire some overage employees while keeping others at work cannot be upheld if it acts arbitrarily or capriciously in differentiating between the workers involved. Differences in treatment may be upheld if based on reasonable grounds. In the absence of such grounds, an employee who is retired while others similarly overage are kept on may invoke the grievance procedure to challenge an unjustified dismissal. It is the Board's opinion that this would be not a case of proper retirement under the pension plan but rather a case of unwarranted discharge."

21. The notion of an implied qualification of management's right to retire reappeared in *Ontario Malleable Iron Co. Ltd.*, *supra*, where a majority of the board indicated that there must be a "bona fide" exercise of this right. The majority there found that the right to retire had been exercised in good faith because the retirement of the grievor at age 68 was not contrary to general practice in industry. As contrasted to the *Rexall* award which spoke to equal treatment, this decision defined good faith in terms of conformity to the prevailing retirement age. This view of good faith appears again in *General Freezer Ltd.*, *supra*, where the

arbitrator gave as an alternative reason for dismissing the grievance the fact that the retirement age conformed to the retirement age prevailing at that time, indicating no lack of good faith on the part of the employer.

22. Equality of treatment emerges again as the essential component of bad faith, however, in *Perth County Board of Education, supra*, where it was stated by the majority that compulsory retirement was justified so long as the employer was not acting in an "unreasonable or arbitrary manner". In that case the majority indicated that the unreasonableness or arbitrariness went to the manner in which the policy was applied, and held that since there was no evidence of an unequal application of the policy the grievance must be dismissed. The significance of equality of treatment can also be seen in *Trustees of Ottawa Civic Hospital* (1976), 10 L.A.C. (2d) 314 (Brown) where a majority of the board upheld the application of the employer's general policy not to exercise its discretion to extend employees beyond the established retirement age. From that award it would appear that uniformity of treatment can serve to justify the substitution of a general rule of no extensions beyond normal retirement age for the discretion to do so provided in the collective agreement.

23. The arbitral authorities reviewed up to this point are all decisions where the retirement was upheld. Although the ultimate result was unfavourable to the grievor, these decisions do indicate that there are some limitations placed upon management's right to retire. We now turn to those cases where grievors have successfully challenged their retirement to determine what guidance they provide as to the standards against which the justness of a retirement should be measured.

24. In *William Kennedy & Sons Ltd.* (1959), 10 L.A.C. 121 (Hanrahan) a compulsory retirement was equated to a discharge which was then found to be unjustified. This approach, however, clearly goes against the grain of an arbitral and judicial authority, and was reconsidered by the same chairman in *Dominion Tar and Chemical* (1960), 10 L.A.C. 381 (Hanrahan) in the light of the comments of the Supreme Court of Canada in *Canada Car & Foundry Ltd. v. Dinham, supra*. Although finding that management could implement a general retirement plan unilaterally, a majority of the board indicated that notice of such a plan must be provided to employees. On the facts the majority found that the employer had not implemented a general policy separate and apart from the pension plan of which the grievor was not a member, apparently because sufficient notice of the plan had not been provided by the employer.

25. A summary of the state of arbitral law following *Dominion Tar and Chemical* is found in *Dunham-Bush (Canada) Ltd.* (1964), 15 L.A.C. 270 (Lang), another arbitration award upholding a grievance relating to a retirement. At p. 280 of that award it is stated:

"A fair summary of the results of the cases above quoted shows that:

1. A pension plan cannot have any effect on persons not covered by the plan. As to persons not covered by the plan the company cannot rely on the plan to justify their retirement.

2. Once an employee joins the plan he agrees to the terms and is subject to retirement according to its provisions.

3. If a retirement plan has been in operation during successive agreements and renewals thereof, employees will be considered to have knowledge thereof and to have acquiesced in it.

4. There are three ways of losing employment, lay-off, retirement, and discharge.

5. Discharge for cause means discharge for improper conduct, breach of rules and regulations, inability to do the job, etc.

6. Management has the right by virtue of common law to institute unilaterally a compulsory retirement plan at a specified age unless in doing so it violates any of the clauses of the collective agreement."

26. The third proposition set out in this summary is of some interest because it appears to dilute the majority view in *Dominion Tar and Chemical* that clear notice of a retirement policy is required, and come close to adopting the dissenting opinion that a retirement plan can be unilaterally implemented without formal notice where there is widespread knowledge of such a plan. Surprisingly, the decision in *Dunham-Bush* upholding the grievance was based in part upon a finding that the grievor was not aware of the company's retirement policy for employees not covered by the pension plan, even though it had been in existence during the twelve years that the grievor had been employed. It is difficult to reconcile this specific finding with the more abstract proposition set out earlier in the award to the effect that formal notice of a retirement policy becomes less essential over the passage of time.

27. The requirement of adequate notice of a retirement policy re-emerges in a recent decision, *Oshawa Times* (1977), 14 L.A.C. (2d) 375 (McLaren). There a majority of the Board found that the retirement of the grievor violated a specific provision in the collective agreement prohibiting certain forms of discrimination including discrimination because of age. A further ground, however, for finding that the retirement was unjustified was that the employer had not announced the retirement policy, so that it could not be said that the policy was established at the time the grievance arose. In arriving at this conclusion the majority of the board distinguished the facts before them from those in *General Freezer Ltd.*, *supra*, where the grievor was notified of the employer's policy three months in advance of his retirement.

28. These three decisions – *Dominion Tar and Chemical*, *Dunham-Bush*, *Oshawa Times* – clearly indicate that reasonable notice of a retirement policy must be given before it can become effective. Distinct notice of a retirement policy appears to be particularly important in these three cases because the grievors were not members of an employer-administered pension plan and could not be said to be aware of any retirement policy contained in such plans. What constitutes clear notice, however, appears to be very much a question of fact, depending on the circumstances in each case.

29. From this review of the arbitral jurisprudence there emerges a general principle that management does have a right to implement retirement policies that remains unfettered by general collective agreement language relating to seniority or discharge. This right, however, is not entirely unqualified, being subject to curtailment by specific collective agree-

ment language and by the implied qualification that it not be exercised in an arbitrary, discriminatory, or unreasonable manner. Three factors appear relevant to a determination as to whether a retirement has breached the standard imposed by this implied qualification. First, the prevailing retirement age must be taken into account when determining if a retirement is reasonable. A retirement at an age below the prevailing standard, in the absence of exceptional circumstances, would point to an unreasonable exercise of management's right to retire. A second consideration is whether there has been an equality of treatment in the application of a retirement policy. In the absence of reasonable grounds for making distinctions between employees, unequal treatment must be regarded as being discriminatory. A third factor is the amount of notice given to an employee of the retirement policy. A sudden application of a general policy without prior notice must be regarded as arbitrary, and an improper exercise of management's right to retire.

30. The question remains as to whether management's right to retire might also be restricted by policies contained in certain public statutes. Counsel for the applicant argued that the collective agreement here should be read in the light of section 40(b) of the *Labour Relations Act*. That section provides:

40. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

According to counsel's argument, the general law set out in section 40(b) does not permit the parties in their collective agreement to discriminate on the basis of age. The collective agreement, therefore, should not be read in such a way as to permit an employer to retire an employee on the basis of age alone. This argument, if it were accepted, would effectively abrogate the general arbitral principle that management does have a right to implement retirement policies based on age. Moreover, it would have the effect of extending to employees covered by collective agreements a much greater immunity from retirement than enjoyed by other employees. Under the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, as am., although age discrimination is prohibited in the employment relationship by section 4(1)(g), "age" is later defined in section 19(ca) as meaning "any age of forty years or more and less than sixty-five years". There is no doubt, therefore, that employees not covered by a collective agreement can be subject to a compulsory retirement policy once they attain age 65. Is it reasonable to assume that the Legislature intended that employees under collective agreements, such as the grievor, could not be subject to compulsory retirement policy regardless of what age they might attain?

31. The Board does not consider that section 40(b) of the *Labour Relations Act* can be applied so as to eliminate management's right under a collective agreement to retire. First of all, it is difficult in this case to conclude that it is the collective agreement itself that discriminates against the grievor because of his age. Strictly speaking, it is not the collective agreement but the exercise of the management's right clause under the collective agreement that has given rise to a management decision to apply its compulsory retirement policy to the grievor. There are broader grounds, however, for not applying section 40(b) in this type of case. The effect of finding that a collective agreement discriminates against a person on the

basis of their age is to render invalid that collective agreement. Once the collective agreement is invalidated, the employment relationship would then be governed by the policy set out in the *Human Rights Code*, permitting compulsory retirement policies where employees are age 65 or over. The grievor, therefore, would be no further ahead, and the parties would be left without a collective agreement. Our conclusion is that the sanction against collective agreements which discriminate on the basis of age in the *Labour Relations Act* cannot be read in isolation from the definition of age contained in the *Human Rights Code*. In this case, since the grievor has reached age 70, general statutory policy relating to age discrimination is not applicable, and we must reach our decision by reference to established arbitral principles.

32. We now come to the question of whether the retirement of the grievor was arbitrary, discriminatory, or unreasonable. The respondent's policy of compulsory retirement of casual employees at age 70 meets, and exceeds, the prevailing retirement age of 65. There is no doubt, therefore, that the policy itself is a reasonable one. It is also clear that the policy was applied uniformly throughout the respondent's organization, so that it cannot be said that the grievor has been treated differently than any other employee who has attained 70 years. Discrimination in the case of unequal treatment of persons attaining retirement age does not exist in this case. The troublesome question, however, is whether the retirement of the grievor was effected in an arbitrary manner.

33. Arbitrariness, as we have already indicated, goes to the amount of notice given by an employer of its retirement policy. If sufficient notice of a retirement policy is provided by the employer, an employee cannot complain that he has been retired in an arbitrary fashion. On the other hand, a sudden severance of employment with no prior notice of a retirement policy would assume the taint of arbitrariness.

34. The respondent in this case promulgated its retirement policy in 1971, approximately six years before the grievor was retired. No general announcement of the policy was made to the applicant or to the employees at that time, but the policy was consistently applied from that time until the present. The evidence indicates that the grievor was not made aware of the policy until some time during the last year of his employment with the respondent, but at least three months prior to his retirement. Approximately three weeks prior to his retirement he received formal notice by letter of that policy and of the respondent's intention to retire him. The grievor was a casual employee and subject to lay-off on one hour's notice under the terms of the collective agreement. The notice that the grievor received, therefore, was far greater than the notice of lay-off to which the grievor would be entitled. In these circumstances, we find that the applicant was given sufficient notice of the retirement policy and his retirement under it. We might add, however, that the respondent would have been on safer ground if it had informed the applicant and all employees of its retirement policy at its inception in 1971.

35. In arriving at this conclusion we have not been unaware of the plight of the grievor. He is an active and vigorous person with a keen desire to continue working. His expectation is that he should be allowed to continue to work so long as he is able to perform the job. Although he has worked hard all his life, he finds that his prospects of receiving even a reduced pension from his union are slim because of his retirement by the respondent. These concerns are legitimate concerns but ones that cannot be met by a process intended only to determine disputes arising from collective agreements. The larger policy issues relating to compulsory retirement must be addressed in other forums.

36. Accordingly, this application is dismissed.

DECISION OF BOARD MEMBER O. HODGES:

1. This is a grievance filed pursuant to section 112a of the Act. The grievor, who has been involuntarily retired, claims that his forced retirement is an “unjustified termination” contrary to the collective agreement. The majority would dismiss the grievance and, while I am in agreement with much of their legal analysis, I cannot agree with that result.

2. The facts are not in dispute. The grievor is in good health and has been employed as a construction labourer for approximately ten years. Throughout this period he has performed his duties satisfactorily. It is not alleged that he is incapable of continuing to work or that he is likely to become incapable in the near future. Indeed the employer asserts the right to terminate the grievor’s employment regardless of his ability.

3. The normal retirement age for the respondent’s employees is age 65, but capable employees continue to work until the age of 70 if there is work available for them to do. During this period the agreement entitles the employer to lay off employees when there is no work available, and discharge employees who are incompetent. In both cases, an employee is entitled by the agreement to an individual assessment of his abilities before his employment can be temporarily or permanently terminated. The employer argues that once the age of 70 is reached these rights no longer exist because it is entitled to unilaterally determine and enforce a compulsory retirement age, and need not justify the application of its policy to particular employees.

4. The collective agreement says nothing whatsoever about retirement. There is no provision for compulsory retirement in the agreement, nor is there a management rights clause which specifically authorizes the introduction of such policy. There is no pension plan of which the grievor is a member or which might have been available to him.

5. I agree with the views of the majority that the decided cases are of little help in resolving the problem before us. Almost all of the cases turn on language or special facts which are not present here. In the *Bell Canada* case, for example, the Supreme Court of Canada held that a “discharge” was not the same as a “retirement on pension”. This collective agreement, unlike the one that was before the Court in *Bell Canada*, distinguishes between discharges and other forms of termination and, in addition, we are not dealing with a “retirement on pension”.

6. The language of the collective agreement in this case is somewhat unusual and may be important in determining the scope of arbitral review; but from the grievor’s point of view the distinction is purely semantic. The grievor has been guilty of no misconduct, and is fully capable of working, yet has been put out of his job. In all likelihood he will suffer a substantial reduction of income at a time when his opportunities for alternative employment are severely limited. The impact of unemployment is not cushioned by the payment of pension benefits. The economic hardship is obvious. Less obvious, but equally important, is the psychological impact upon an individual who is willing and able to work but who has been denied the opportunity to do so. In a society which rewards persons on the basis of their initiative and economic utility, he has been deprived of his social worth. It is quite understandable that from his viewpoint the company’s policy works an injustice

which can be easily avoided by simply treating him in accordance with his actual capabilities.

7. Because of the serious impact on the grievor's rights it seems to me that the employer must justify its policy and positively demonstrate why that policy is essential for the orderly and efficient operation of its business. I am reluctant to find justification solely in the assertion, without more, of a unilateral policy which is not grounded in any explicit language in the agreement and which severely restricts rights which are present in the agreement. If the employer sought to terminate the grievor for incompetence or inability it would have to assess his ability and justify its actions. It seems unjust in my view that it can avoid this obligation simply by asserting an arbitrary retirement age in circumstances where age can at best provide only an approximation or inference concerning the employee's fitness. If a capable employee is to be put out of his job and subjected to the hardship of unemployment, there is, in my view, a very heavy onus upon the employer to justify this result.

8. A number of reasons might have been advanced by the employer to support a compulsory retirement policy. It is sometimes argued that retirement of the old is necessary to open up avenues of advancement for the young – a contention which may have more force in periods of high unemployment. However, this is simply an argument for shifting the burden of employment from the young to the old – a suggestion of dubious merit, especially where, as here, there are no pension benefits and the aged are severely handicapped in the competition for alternative jobs. Indeed, the seniority provisions of collective agreements are designed to protect *capable* employees from this risk. Whatever the social utility of compulsory retirement (and it can be regarded simply as a waste of skilled manpower seasoned by experience), it is submitted that this general argument is not one upon which an arbitrator can reliably rest his decision.

9. There is some guidance however in the general approach which arbitrators take to the question of company rules. Plant rules which are unilaterally promulgated and are not grounded in specific language in the collective agreement must not be inconsistent with the terms of that agreement and must be reasonable. As Brown and Beatty have noted:

“In applying the standard of reasonableness arbitrators assess the extent to which the rule is necessary to protect the employer's interest in operating the plant, in preserving its property and generally in carrying out its operations in a reasonably safe, efficient and orderly manner. ... Similarly where a rule purports to regulate or concern itself with the employees' private lives to be reasonable the employer must establish a substantial connection with its legitimate interest.”

This is the test which must be applied in this case but in my view the employer has simply not established why it is essential to compulsorily retire capable employees who have reached the age of 70.

10. It is obvious that age brings about a deterioration of intellectual and physical ability, so that retirement at some point is inevitable. It is not so obvious why chronological age must be treated as an irrebutable presumption of incapacity for employees who have already demonstrated their ability to work past the normal retirement age. I simply do not see the threat to the employer's business which flows from retaining experienced and capable

employees, nor am I persuaded that the employer's manpower requirements are prejudiced in any way. The employer is entitled to satisfy itself (by medical examination or otherwise) that employees are physically fit, do not pose a hazard to themselves or others, and are capable of performing the jobs to which they are assigned. Indeed, these are the very criteria which were applied to the grievor prior to his attaining the age of 70.

11. The essence of the majority's decision is simply this: so long as the compulsory retirement age is above the age of 65, it is reasonable *per se* and any termination is therefore "justified". The actual retirement age chosen is irrelevant. An employer must justify its termination up to that age, but thereafter the termination is subject to only very limited arbitral review. Of course, if the employer sought to terminate an employee because he was incapable, or likely to become incapable, or because it was necessary to "make room at the top" for younger employees or for "manpower reasons" or for any other legitimate business reason, it would have to specifically enunciate and rely upon that rationale. On the majority view, this obligation can be avoided in the case of compulsory retirement and the actual reasons for the policy need not be justified or even elaborated, nor need the employer consider the injustice of its application to a particular employee. What makes this position particularly ironic is that this employer's own conduct indicates that capable employees are able to work beyond the age of 65 and make a contribution to the business.

12. In my view, an employer cannot satisfy his obligation to justify an employee's termination simply by picking an age above 65. It seems to me that it is not relevant whether the age chosen is 66 or 76. Whether the employer is "justified" in terminating employees at whatever age is chosen, depends upon the circumstances of the case. One relevant consideration is the normal retirement age in industry. This is not the only consideration, however, and in my view the collective agreement requires an employer to justify its termination in the context of its particular work environment, having regard to the employee's ability and circumstances. In this case, the employer has neither justified its general policy nor the application of that policy to this grievor. There is no doubt that the policy works a great hardship on persons in the position of the grievor. Speaking for myself, I can see little tangible benefit to the employer from retiring experienced and capable employees. Let me emphasize, however, that the employer's right to terminate *incapable* employees is not challenged and is not the issue in this case.

13. The remaining matter involves the extent of notice which the grievor should have received. This policy was not part of the collective agreement nor was it specifically communicated to employees in the grievor's position. On the evidence before us, I would find that the grievor received only three months notice that he would be terminated. In my view this is totally inadequate – especially given the difficulty which this particular employee will have finding alternative employment or otherwise providing for his unemployment.

14. In the result, therefore, since in my view the employer has not justified the grievor's termination, I would order him reinstated.

1711-77-M Christian Labour Association of Canada, (Applicant), v. **Crown Electric** owned and operated by Crowle Electrical Ltd., (Respondent).

Arbitration – Section 112a – Effect of written settlement of grievance – Whether Board will entertain evidence to contradict plain meaning of settlement – Whether new or original grievance barred.

BEFORE: M. G. Picher, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *W. R. Herridge, E. Forester and J. Adema for the applicant; R. C. Filion, John Crowle and Jack Crowle for the respondent.*

DECISION OF THE BOARD: April 21, 1978

1. This is a referral of a grievance under section 112a of The Labour Relations Act.
2. It is common ground that this grievance is identical to a prior grievance between the same parties filed under section 112a of the Act. (Board File 1599-77-M, February 1, 1978). That grievance was withdrawn by leave of the Board in circumstances which the employer submits amounted to a final written settlement of the dispute between the parties. It is not disputed that a prior settlement of the grievance would be a bar to these proceedings. (See *City of Sudbury* (1965) 15 L.A.C. 403 (Reville)). On that basis counsel for the employer objects to the arbitrability of the instant grievance.
3. The applicant union makes two responses to that objection. Firstly, it maintains that the document signed by the parties to dispose of the original grievance is not a true settlement in that the parties were mistaken as to its meaning. Alternatively, the union submits that if there was a settlement its own interpretation of the terms of the settlement should be enforced in these proceedings. The union asks leave to adduce extrinsic evidence either to establish that no settlement was in fact reached, or that if a settlement was reached, to determine whether the true terms of that settlement are different from what appears on the face of the written document which was filed by the employer.
4. Under section 112a of the Act this Board is charged with determining the arbitrability of a grievance. To do that in the instant case it must determine whether there has been a prior settlement which would be a bar to any further claim. That, in turn, requires the Board to construe the document which the employer submits is a final settlement of the grievance that is the subject of these proceedings.
5. Before proceeding to that task it is necessary in the instant case to bear in mind certain fundamental principles of the settlement process in industrial relations. Virtually all collective agreements contain a grievance procedure which must be followed and exhausted before parties may refer a grievance to a board of arbitration. The grievance procedure has as one of its purposes the broadening of communication to promote settlement on a voluntary basis. Because the vast majority of disputes between employees and employers are resolved at these pre-arbitration stages, they are an important factor in clarifying and disposing of disagreements between the parties respecting their rights and duties under a collective agreement. Both boards of arbitration and this Board have consistently respected the im-

portance of the grievance procedure as integral to a sound collective bargaining relationship and have been careful not to undermine its effectiveness by gratuitous interference with it through adjudication; labour relations tribunals have universally sought to promote and protect the settlement process. (See e.g. *Borough of Scarborough* (1972), 24 L.A.C. 78 (Shime) and *Reed Limited, Furniture Division*, as yet unreported, Board File 1296-77-U, Jan. 19, 1978). It is obviously essential to both parties and to their ongoing relationship that they be able to rely on settlements reached in pre-arbitration procedures as forever quieting grievances terminated in that way. Thus settlements reached in pre-arbitration proceedings are not lightly to be tampered with and re-opened.

6. The same considerations apply in an application under section 112a of The Labour Relations Act. While that section provides that a grievance may be referred to this Board “notwithstanding the grievance and arbitration provisions in a collective agreement”, as indicated above, it reserves to the Board the determination “as to whether a matter is arbitrable”. That is to say, it contemplates the application of the appropriate principles of arbitral jurisprudence respecting settlement of a grievance prior to the hearing. The only difference in section 112a proceedings is that an additional or alternative pre-hearing resolution procedure is introduced in the form of mediation through the Board’s Labour Relations Officer.

7. Before the Board hears a grievance under section 112a of the Act, it appoints a field officer who is directed, in the words of the Board’s usual order, “... to confer with the parties to endeavour to effect a settlement of the grievance ...”. The Board’s experience has been that the great majority of section 112a applications are settled prior to hearing with the assistance of the Board’s officer. Obviously the parties’ interest in finality is no less important where grievances are referred under section 112a. Thus settlements arrived at with the assistance of the Board’s officer are not lightly to be interfered with.

8. If anything, the Board must apply still greater circumspection in dealing with documents that purport to be settlements achieved through the endeavours of its own officers than might be the case in private arbitration. An officer mediating a dispute between two parties needs a wide latitude to conduct free and confidential discussion. The chances of success in mediation will be enhanced to the extent that the parties and the officer can know that their statements will not themselves be a cause of further dispute or be subject to close scrutiny in subsequent proceedings.

9. Thus it is that a statutory privilege and immunity has been included in the Act with respect to communications received by a Labour Relations Officer. Section 100(6) of the Act provides:

100(6) No information or material furnished to or received by a labour relations officer under this Act and no report of a labour relations officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no labour relations officer is a competent or compellable witness in proceedings before a court, the Board or other tribunal respecting any such information, material or report.

While that section allows the Board a discretion to permit the disclosure in its own proceed-

ings of communications made to a labour relations officer, it recognizes the sensitive nature of the officer's role and contemplates that information of that kind will not be disclosed as of course. While each case must be determined on its own merits, the Board will generally apply the section so as to render privileged any communications made privately between one of the parties and the labour relations officer in the absence of the other party. The privilege thus extended is analogous to the privilege attaching to private communications between a party negotiating a collective agreement and a conciliator or mediator assisting the parties (cf. *CCH Canadian Limited* [1974] OLRB Rep. June 375).

10. In the instant case both parties engaged in private communication with the Board's labour relations officer and the result of that communication was the execution by both of them of a purported settlement witnessed by the Board's officer. It provides:

Agreement of settlement of all matters in dispute

1. The respondent agrees to a cash settlement of \$2,376.42, to cover all compensation to the three grievors; Albert Proulx, Raymond Parr, and Olavi Hukari conditional upon them proving that they have not had earnings from any other source since date of lay-off. Such proof will be acceptable in the form of a signed statement duly signed by each grievor and witnessed.
2. The Union (C.L.A.C.) withdraws its claim of reinstatement for the three above-named grievors.
3. The Union (C.L.A.C.) as a result of this settlement seeks leave of the Board to withdraw this grievance.

11. The union's submissions go to the interpretation of the first sentence of paragraph one of the document. That sentence appears to the Board to be clear on its face, and that it provides for a global sum of \$2,376.42 in total satisfaction of the claims of all three grievors. The union submits that it executed the agreement believing that it provided for payment of \$2,376.42 to each of the grievors and seeks to adduce extrinsic evidence to either show that to be the true meaning of the document or to establish that there was in fact no settlement because the parties were not *ad idem* when they signed the agreement of settlement.

12. Generally parol evidence or extrinsic evidence is not admissible to vary or contradict the terms which appear on the face of a written agreement unless there is established some ambiguity in the document itself. Extrinsic evidence may be adduced as an aid to interpretation where ambiguity is patent on the face of the agreement. It may also be introduced to establish a latent ambiguity, that is an ambiguity which is not apparent on a plain reading of the document itself.

13. But a distinction must be drawn between latent ambiguity and a mere difference of interpretation of words which are not otherwise ambiguous. Parol evidence may be necessary to establish latent ambiguity respecting the formal validity of documents, the identity of parties or the meaning of technical terms or terms of special usage (*Alampi v. Swartz* (1964) 43 DLR (2d) 11 (Ont. C.A.)). It may be admitted to show ambiguity in the use of a proper noun, as where two parties agreed to the sale of cotton to be delivered "ex Peerless"

from Bombay where there were in fact two ships named “Peerless” sailing from Bombay at different times (*Raffles v. Wichelhaus* (1864) 159 E.R. 375). But the mere fact that there may be two arguably different constructions of a set of words does not of itself establish latent ambiguity. Because of the greater evidentiary value of written instruments and the general need for legal finality, courts and boards of arbitration alike have declined to admit extrinsic evidence that would do no more than establish the possibility of two contrary and self-serving interpretations.

14. In this regard the Board adopts the following words of the majority of the board of arbitration in *Re International Nickel Co. of Canada Ltd.* (1974) 5 L.A.C. (2d) 331 at 333 (Weatherill).

“It may be that the provisions of the collective agreement here in issue pose a problem of construction, so that they may be said to be ‘of doubtful meaning’ in that very general sense. In our view, however, the interpretation of the notion of ‘latent ambiguity’ to include generally ‘all cases of doubtful meaning or application’ (*Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Inc.) et al.*, [1969] 1 O.R. 469, 3 D.L.R. (3d) 161, at p. 524 *per* Gale, C.J.O.), should not be, and was not intended to be taken so far as to open the door to the admission of extrinsic evidence wherever a disagreement as to the construction of a document arises. If that were allowed, the strength of a document such as a collective agreement would be greatly reduced, and the well-established rules respecting the admission of extrinsic evidence would be meaningless.”

15. There is no ambiguity in the words “all compensation to the three grievors” and in our view the extrinsic evidence which the applicant seeks to introduce would not establish a latent ambiguity. Rather, it would merely provide the basis for disagreement as to the interpretation of a document that is clear on its face and for which no latent ambiguity could be shown. For that purpose extrinsic evidence is inadmissible.

16. Counsel for the union argued alternatively that extrinsic evidence should be admitted to establish either a unilateral or mutual mistake. This is a case where all communications were made through the medium of a labour relations officer who dealt with each party out of the presence of the other. In order to protect the integrity of the Board’s accommodative process these communications are protected by a statutory privilege. In these circumstances we see no reason for the admission of extrinsic evidence to support the application of the doctrines of unilateral or mutual mistake.

17. Parties who enter into written settlements have a responsibility to ensure that they are fully aware of the implications of any document to which they attach their signatures. In the absence of any allegation of fraud the Board must assume that parties have agreed to any settlement plainly expressed in a written document, or otherwise no settlement would be immune from a subsequent challenge. We do not regard the applicant’s argument as containing an allegation of fraud and, therefore, we are not prepared to accept extrinsic evidence of this basis.

18. For all of the above reasons the Board sustains the respondent’s preliminary ob-

jections. The grievance in the instant application is not arbitrable because there has been a final and binding settlement. By the terms of that settlement the parties have provided for the payment of a total of \$2,376.42 as a global sum in satisfaction of the claim of all three grievors. The referral of this grievance must therefore be dismissed.

1520-77-M Local Union 1687 of the International Brotherhood of Electrical Workers, (Applicant), v. Sudbury Electrical Contractors Association (S.E.C.A.) and **M. G. Burke Investments Ltd.**, (Respondents).

Arbitration – Section 112a – Parties – Status of individual employer where agreement is between union and accredited employer association – Whether Board has jurisdiction to adjudicate dispute respecting electrical work performed on chattels and maintenance work – Whether such work is in the construction industry

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members E. Boyer and W. H. Wightman.

APPEARANCES: *J. Sack, E. Poskanzer and C. Boberge appearing for the applicant; K. R. Valin and David McNab appearing for M. G. Burke Investments Ltd.; no one appearing for Sudbury Electrical Contractors Association.*

DECISION OF THE BOARD; April 19, 1978

1. This is a referral of a grievance to the Board for final and binding determination pursuant to the provisions of section 112a of The Labour Relations Act.
2. M. G. Burke Investments Limited ("the company") has its place of business in the City of Sudbury. Certain aspects of its business are carried on in the construction industry while certain other of its activities are outside the scope of the construction industry.
3. On February 28, 1977 the applicant union ("the union") was certified to represent certain electricians and electricians' apprentices in the employ of the company engaged in construction work. (See: File No. 0640-76-R decision of February 28, 1977, unreported). On June 28, 1977 the Sudbury Electrical Contractors Association ("the contractors association") was accredited to represent employers for whose employees the union possessed bargaining rights. The grievance filed in this matter relates to an alleged violation of a collective agreement between the union and the contractors association.
4. Although both the company and the contractors association had been named as respondents to the application, only the company was represented at the hearing. At the commencement of the hearing counsel for the union took the position that only the contractors association had status to respond to the application and that therefore the company did not have standing to participate in the proceedings. In support of this position he relied upon section 116(1) of the Act which stipulates that all rights, duties and obligations under the Act of employers apply to an accredited employers' organization. The Board at the time

ruled orally that the company did have status to participate in the proceedings. This ruling was based upon a conclusion that any determination of the grievance might have a direct and adverse affect on the interests of the company, and that therefore the company was entitled by the common law rules of natural justice to participate in the proceedings. Counsel for the union requested that the Board give reasons in writing for this decision.

5. Subsequent to the hearing in this matter a differently constituted panel of the Board dealt at length with the status of an employer in section 112a applications such as this where the employer although bound by a collective agreement is not one of the contracting parties to the agreement. See: *The Electrical Power Systems Construction Association and Ontario Hydro* File No. 2138-76-M, decision of March 14, 1978, as yet unreported. In reaching the same conclusion concerning the employer's status as did the panel in this case, the Board made the following statements which this panel would adopt as the rationale behind its own ruling.

5. Section 5 of *The Statutory Powers Procedure Act*, S.O. 1971 c.47, provides:

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

By the operation of that section a tribunal must first have recourse to the statute governing its proceedings to determine whether the parties to the proceedings before it have been statutorily defined.

6. These proceedings are under section 112a of *The Labour Relations Act*, and while that section provides that a party applicant must be a party to the collective agreement it is silent as to who may be a party respondent or an intervener. The question then becomes who would be "persons entitled by law to be parties to the proceedings", as provided by *The Statutory Powers Procedure Act*. In other words who, according to the common law of natural justice, should be given notice and afforded an opportunity to participate in the proceedings?

7. We have no doubt that Ontario Hydro (i.e. the employer involved) must be a party in that sense. It is well settled that a person whose interests may be directly and adversely affected by an adjudication in respect of a collective agreement is a proper party to those proceedings notwithstanding that he may not, strictly speaking, be one of the two parties to the collective agreement. In that circumstance a board of arbitration has a duty to give notice of its proceedings to the person or company in question and to afford them a full opportunity to participate. (*Re Bradley and Ottawa Professional Fire Fighters Ass'n* (1967) 63 DLR (2d) 376 (Ont. C.A.), *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co.* (1968) 65 DLR (2d) 641 (S.C.C.)) Thus the parties to a collective agreement and the parties to proceedings relating to that agreement need not always be one and the same. And that is so no less under section 112a of *The Labour Relations Act* than in other arbitration proceedings.

8. A party which has received notice of an application and of the Board's hearing in respect of it is not, of course, required to appear to take part in the hearing. But its decision not to appear does nothing to alter its status as a party, save that it may be foreclosed from intervening at a late stage of the proceedings (e.g. *York University* [1967] OLRB Rep. Apr. 187). That is reflected in the definition of "party" section 1(1)(b) of the Board's Rules of Procedure whereby it is provided that "party" includes each person served with notice of an application or complaint regardless of whether they choose to appear.

9. In the instant case Ontario Hydro is the specific employer member of EPSCA (the employers association) which is alleged to have breached the collective agreement. It has particular knowledge of the events alleged and must be directly and substantially affected by any order of this Board disposing of the grievance. And it has had notice of this application. Having regard to those facts, to the established rules of natural justice as reflected in the above decisions and to the Board's own Rules of Procedure, we find that Ontario Hydro, no less than EPSCA, is a proper party respondent in these proceedings.

6. As noted above, the union in this case was certified only with respect to electricians and electricians' apprentices in the employ of the company engaged in construction work. The position of the union, however, is that the collective agreement between the union and the contractors association is binding on the company with respect to its employees engaged in both construction and non-construction work. The company agrees that it is bound by the collective agreement with respect to its construction work, but denies that the agreement also covers non-construction work. There is no dispute but that the company has not been paying the wage rates provided for in the collective agreement with respect to its non-construction work, and it is basically the differential involved which the union is claiming through its grievance.

7. At the hearing the union also challenged the company's contention that it had paid the collective agreement wage rate for all of its construction work. The company's response to this challenge was that its aim had been to pay the collective agreement rate for all construction work and that if it had erred in determining what was, and what was not, construction work, then it was quite prepared to correct its error.

8. The basic matters in dispute between the parties have been set out above. As a separate issue, however, the parties also disagreed on the jurisdiction of this Board to adjudicate the merits of the grievance in so far as they relate to work done outside of the construction industry.

9. It is apparent from a reading of section 37 of the Act that the general statutory scheme for the adjudication of unsettled grievances is by way of the arbitration procedure provided for in the collective agreement under which a particular grievance arises. Not only does section 37 require that every collective agreement include a provision for the arbitration of grievances but it also sets out a number of provisions relating to the power of arbitrators and the enforcement of arbitration awards. The only exception to this general scheme is that provided for by section 112a of the Act. Section 112a has the effect of allow-

ing this Board to fulfill the functions of a board of arbitration. The section, however, is not one of general application but is restricted only to the construction industry. In enacting the section, the Legislature appears to have taken into account the somewhat unique circumstances of the construction industry and the fact that frequently standard arbitration procedures are ill-suited to the needs of the industry. (See *The Lummus Company Canada Limited* case [1976] OLRB Rep. Jan. 980).

10. The company here is seeking to have this Board act as an arbitration board with respect to matters arising outside the scope of the construction industry. We are satisfied that the Board lacks any jurisdiction to do so. While the Board has the authority to adjudicate the grievance in so far as it relates to the construction industry, recourse must be had to the grievance-arbitration procedures contained in the collective agreement itself for those matters outside of the construction industry. It should be noted that both the construction and non-construction aspects of the grievance could have been dealt with by an arbitrator appointed pursuant to the terms of the collective agreement.

11. Although the Board lacks the authority to adjudicate this grievance in so far as it relates to the company's operations outside the construction industry, there still remains the question of whether certain work classified by the company as being non-construction in fact fell within the construction industry. The answer to this question in large measure is contained in the Board's decision relating to the certification proceedings involving the company and the union. In that decision the Board dealt at length with the question of what aspects of the company's operations come within the construction industry. We would adopt the reasoning set forth in that decision. In particular, we are satisfied that the installation, repair or removal of electrical wiring systems to building structures or fixtures is work done in the construction industry, but that electrical work performed on chattels and maintenance work (as opposed to repair work) is outside of the construction industry.

12. The Board will remain seized of this application should the parties still be at issue over the question of whether the company has violated the collective agreement with respect to its operations in the construction industry.

1953-77-M International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant), v. **Arthur G. McKee & Company of Canada Ltd.**, (Respondent).

Arbitration – Section 112a – Parties – Status of individual employer where collective agreement is between union and accredited employer association

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. Gibson and W. F. Rutherford.

APPEARANCES: Pamela Sigurdson and Stan Arsenault appearing for the applicant; David I. Wakely and L.M. Guest appearing for the respondent; Robin B. Cumine, Q.C., appearing for the Ontario Erectors' Association; and L. C. Arnold appearing for the United Association of

Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46.

DECISION OF THE BOARD; April 11, 1978

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The respondent, the Ontario Erectors' Association (OEA) and the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Local 46) each opposed this grievance and raised preliminary objections to the Board's jurisdiction to entertain the grievance.
3. At the conclusion of the argument with respect to the Board's jurisdiction, the Board dismissed this application without prejudice to the filing of a further grievance by the applicant and stated that written reasons would follow. The Board now sets forth its reasons for dismissing this application on April 6, 1978.
4. Various local trade unions (including the applicant) of the International Association of Bridge, Structural and Ornamental Ironworkers and the OEA are parties to the collective agreement under which this grievance has been filed. The OEA is an accredited bargaining agent. Sections 112a(1) and (2) and 116(1) provide:

112a(1) – Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, either party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

112a(2) – A referral under subsection 1 may be made in writing in the prescribed form by the party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

116(1) – Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply mutatis mutandis to the accredited employers' organization.
5. The parties to the collective agreement, in so far as it affects this application, are the various local trade unions of the International Association of Bridge, Structural and Ornamental Ironworkers and OEA. By virtue of section 112a(1) and section 116(1) the OEA is a necessary party to this grievance. However, this requirement does not prevent the respon-

dent from also being a party to this grievance. The OEA was not named as a party to this grievance by the applicant even though the provisions of section 112a(1) and 116(1) clearly make it a necessary party to this grievance. In an analogous case, the Board concluded that the only proper party to bring an application under section 112a was the accredited employers' organization. See the *Ainsworth Electric Co. Limited* case, [1977] OLRB REP. 399.

6. However, this is not a situation where the failure to name the OEA as a party may be corrected merely by adding the OEA as a party. Section 112a(2) states that a grievance may be made in writing at any time after delivery of the written grievance to the other party. The OEA has not received the written grievance prior to the making of this referral. The sending of a copy of a telegram regarding the grievance to the OEA does not constitute "delivery of the written grievance to the other party" as required in section 112a(2). In our view the accredited bargaining agent is entitled to notice of a grievance before it is referred to the Board pursuant to section 112a(1). The OEA was entitled to participate fully in the grievance and it was not given such an opportunity.

7. Since the necessary conditions which are precedent to the referral of this grievance have not been complied with, the Board dismissed this application. However, this dismissal is without prejudice to the filing of a further grievance by the applicant.

8. Local 46 made further arguments in support of the dismissal of this grievance. In view of the conclusion which it has reached, the Board does not consider it necessary to review the arguments which were advanced by Local 46.

1540-77-R United Steelworkers of America, (Applicant), v. S. D. Adams Welded Products Limited, (Respondent).

Certification – Interference in Trade Unions – Bargaining Unit – Employee – Whether employee-directors of company are managerial if they do not exercise managerial authority over fellow employees – Effect of involvement of employee-directors in organizing campaign – Whether employee-directors must be excluded from the bargaining unit

BEFORE: E. Norris Davis, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: *P. Warrian for the applicant; Harry Freedman and Simpson Hollingsworth for the respondent.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; April 14, 1978

1. The name: "S. D. Adams Welded Products Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "S. D. Adams Welded Products Limited".

2. This is an application for certification in which two of the employees in the proposed bargaining unit are also directors of the corporation which employs them. Aside from their director status, the individuals are clearly not employed in a managerial capacity or in a confidential capacity in respect to labour relations. Counsel for the respondent directs the Board's attention to section 12 of the Act as precluding certification where, as here, directors of the company have participated in the organization. Respondent's counsel alternatively argues that, in any event, employees who are also directors of the company should not be included in the bargaining unit established by the Board, but should be found to be exercising managerial functions bringing them within the exclusionary operation of section 1(3)(b) of the Act.

3. Mr. Simpson Hollingsworth, is executor of the estate of the deceased principal shareholder of the company and a director of the company. There are a total of 4,203 outstanding shares of which 47 are held by five employees. The Board of Directors consists of 9 Directors, although there is currently one vacancy on the Board as a result of the resignation in December, 1977 from both the Board and from employment of the then Vice-President and General Manager. Of the employees, who are also Directors, two of them are also employees performing managerial functions, three of them are employed in classifications normally included in the bargaining unit. (It should also be noted that one of this latter group of employee-directors is a member of a trade union, other than the applicant, with which the respondent has, for some time, had collective bargaining relations.)

4. In 1971, Adams, the then principal shareholder of the company decided to sell shares to the employees and elect employees to the Board of Directors. On his death in October 1974, Adams' widow was elected Chairman of the Board and Hollingsworth as executor and trustee of the estate was elected to the Board. Hollingsworth testified that since that time Board meetings have consisted of a meeting prior to the annual shareholders' meeting and a meeting immediately following the shareholders' meeting for the appointment of officers.

5. Hollingsworth, himself, has never had any signing authority and states that the Directors act as a Board only and with an individual director having no authority to bind the company. During Hollingsworth's service as a director it was testified that Board discussions centred chiefly on the financial condition of the company and the receipt of the General Manager's report. It was stated that the Board acted as policymakers and that there had never been discussion of such specific items as seniority, wages, pensions, discipline etc. other than in the January 1978 meeting.

6. Following the resignation in December 1977 of the General Manager, the principal shareholder concluded that a buyer of the business should be sought. This resulted in a letter of intent to the principal shareholder making an offer for his shares and also undertaking to make a similar offer to minority shareholders. Under the company's by-laws a transfer of shares required the consent of the Board of Directors as the approval by a special shareholders' meeting called for that purpose. A Board of Directors meeting was called for January 3, 1978, and continued for 1½ – 2 hours. During this meeting there was considerable discussion by directors who were employees, as to what would be the impact of such a sale of shares on their future employment status and established working conditions. Hollingsworth, at this meeting, explained that since the transaction involved acquisition of shares, rather than assets, it was likely that the business would continue to operate with the same employment conditions.

7. On January 6, 1978, Roger Poirier who is a crane operator and has been employed by the respondent for 19 years, went to the applicant's office accompanied by Louis Belanger, also an employee, to enquire about organizing into a union. Poirier was at that time the owner of two shares of stock in the respondent's company and a member of the Board of Directors. Additionally, Poirier had been present at the January 3, 1978 Directors' meeting.

8. Poirier testified that following the January 3, 1978 meeting, job security as an employee was a real concern in his mind. He further testified that there had been on-going discussions amongst the employees about forming a union for the past year, and that following his visit to the union's office, securing of membership cards, he and Belanger returned to the plant and signed up all of the employees during a fifteen minute coffee break. Poirier states, "the guys were ready" and that he had probably told them about the impending sale of the business.

9. Poirier states that his visit to the union's office was made at the request of the employees and that further he had never had any directions from the Board of Directors, or from any officer of the company, or any supervisor to take this action. He said "I never thought I couldn't be in the union. Everybody in the company knows I am a Director".

10. Bernard Schultz, a representative of the United Steelworkers, confirms the visit of Poirier and Belanger on January 6, 1978 at which time he supplied the application cards and outlined the steps required to be taken. Schultz states he was told that some of the employees had shares in the company, but it was not until following the first hearing before this Board that he became aware that some employees were also directors. It should be noted that the issue was not raised in the respondent's reply but was raised by subsequent letter which did not come to the applicant's attention until the day of the hearing.

11. Poirier and Belanger returned to the union's office on January 6, 1978 with the signed cards and the present application was filed. As it turned out the cards filed suffered from an internal defect of which Schultz was advised by the Steelworkers Toronto office. A meeting of all employees was therefore called by Schultz at the union's hall on January 12, 1978 and cards in the appropriate form again signed and witnessed and dispatched to the Board.

12. It is clear from the evidence before us, that union organization was triggered by the events of the January 3, 1978 Directors' meeting. It is also clear that the union organization did not have its genesis in any decision or direction of the Board of Directors or in any activity by a managerial employee of the respondent. Organization was initiated by Poirier (acting in his capacity as an employee) and others who felt that such action was in their own best interests in their employment relationships with the respondent. It may well be that the facts motivating Poirier were those which had come to him because of his separate capacity as a Director of the respondent. This, in itself, is of no concern to this Board or of any consequence in our application of The Labour Relations Act. The question before us is whether the role of Poirier and perhaps other employee-directors, in the formation of the union and its future administration is such as to bring this case within the ambit of section 12 of the Act.

13. Section 12 of the Act provides:

12. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

Does Poirier's participation in the formation of the union equate with participation by the employer? Poirier was a member of the Board of Directors. Section 132(1) of the Business Corporations Act provides,

"The Board of Directors shall manage or supervise the management of the affairs and business of the corporation".

The employer in this case is S. D. Adams Welded Products Limited which, as a corporation, can only fulfill its objectives through actions initiated by its Board of Directors and/or through officers appointed by that Board and/or through other representatives of management. No action can be initiated by directors, as such, other than when they act collectively as a Board: no individual director acting on his own is clothed with any authority to commit the corporation in external business matters. Nor does any director acting individually on his own initiative, have any internal managerial authority. The question remains, however, whether Poirier was perceived by the employees as acting on behalf of the employer. Did the participation in the union organizing drive of Poirier, known to be a director of the company, cause the employees to conclude that in the act of applying for union membership, they were satisfying a perceived wish of their employer?

14. We do not believe such an inference can be drawn. No evidence was led to indicate that Poirier (or any other employee director) in his employment relationship was accorded any treatment different from other employees because of his concurrent status as a director. There was no evidence that he had, or was considered to have, any authority or control over employees because of this status. This is not the first occasion where a director of the respondent has engaged in union activity. Another employee-director, Amelio, is a member of a bargaining unit represented by the Ironworkers with whom the respondent bargains. (The parties have agreed that Amelio be excluded from the proposed unit when engaged in outside structural work covered by the Ironworkers union.) The dual role played by Amelio suggests that the employees would not perceive Poirier to be a representative of the employer simply because he had been appointed to the Board of Directors. The inference to be drawn is that Poirier and Amelio were perceived as representing the interests of employees on the Board of Directors. This inference is re-inforced by the presence on the Board of certain managerial employees, who would be perceived by the employees as representing management in the Board rather than as employee-directors.

15. Counsel for the respondent refers us to the *Dr. Geo A. Morgan UAW Dental Centre* case reported in [1977] OLRB Rep. Jan. 1 where the Board refused to entertain an application for certification made by the International Union in respect to the facilities owned and operated by one of the International's locals. The Board there concluded that the conflicts of interest in that particular relationship were so inherent that the application fell squarely within the proscription of section 12. It is obviously a question of fact in each case and in the instant case we do not find any umbilical cord, such as existed in the *Geo. A. Morgan* case, connecting the employer and the applicant union. Here it is of some signifi-

cance that it was only when Poirier's status as a director was raised at the first hearing, that the applicant became aware of Poirier's dual role.

16. We believe in view of all the surrounding circumstances in this case that it cannot be said that there has been participation by the employer in the formation of the union. Indeed it is quite clear that the employees in taking the step towards organization were not motivated with a desire to comply with any spoken or unspoken wish of the employer: on the contrary, their action was founded in their concerns over their own futures and welfare which they feared were about to be adversely affected by impending employer's action. The employees' actions were taken to protect their own interests against what they viewed might be the employer's actions. We therefore find that section 12 is not operative in this case.

17. We now come to the question of exclusionary impact of section 1(3)(b). In all preceding cases the Board has dealt with persons who were employees and whose duties as employees involved to a greater or lesser degree the exercise of a managerial function in varying degrees of frequency, or involving confidentiality in labour relations. In the case before us we are dealing with a person who is an employee and whose duties as an employee clearly do not touch on any managerial function or confidentiality in matters relating to labour relations: what we must decide is whether Poirier's status as a director nonetheless places him within the exclusionary operation of section 1(3)(b) which reads:

1. – (1) In this Act,

(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Thus, two questions for decision are posed. These are, whether Poirier "exercises managerial functions" or alternatively, "is employed in a confidential capacity in matters relating to labour relations". The extent of the second exclusionary ground – employment in a confidential capacity relating to labour relations – was considered in the *York Condominium* case [1975] OLRB Rep. July 534 to which we are referred by the respondent. This case raised a problem somewhat similar to the one now before the Board. In that case the Board held that the mere possession of confidential information in respect of labour relations, where such information was acquired as a result of the individual's status other than his employee status was insufficient to lead to an exclusion. The Board there held that the test was not the coming into possession of confidential information which provided the basis for an exclusion but rather whether the person is "*employed* in a confidential capacity in matters relating to labour relations". In the case before us the evidence was unequivocal that Poirier was employed as a crane operator and in that capacity it was not necessary for him to have, nor did he acquire, any confidential information. Any confidential information which he might possess, of a financial or other nature, came to him by virtue of his director status. This is a situation quite parallel to the *York Condominium* case and, in applying the same reasoning we conclude that Poirier was *not employed* in a confidential capacity in matters relating to labour relations and cannot therefore be excluded on those grounds.

18. We turn now to the application of the exclusion based on Poirier's exercising managerial functions which is more problematical. In the *York Condominium* case, although the Board found that because of the extreme minority position (two owners out of a total of 400) of the two persons in question, they could not be said "to play an active and direct role in management". The Board also expressed the opinion that it might not have reached the same conclusion had these two persons also had the status of directors. The question of the collective bargaining status of employee-directors, however, must be more fully canvassed in this present case.

19. A review of the Board's jurisprudence in respect to defining the "exercise of managerial functions" indicates close concentration on those aspects of an employee's duties which involve supervision and control over other employees in the unit (see *Falconbridge Nickel Mines Ltd.* OLRB Rep. Sept. 1966 p. 379 and the line of cases), or on those aspects of an employee's duties which involve control or determination of processes or formulation of policy (see *Hydro Electric Comm. of Ontario* OLRB Rep. Aug. 1969, p. 669). An examination of the employee's duties of the persons here involved does not reveal any basis for basing an exclusion on these grounds. If we are to arrive at a conclusion that there is to be an exclusion on the grounds of exercising managerial functions it must arise solely out of the director status and must be based on the potential for a conflict of interest.

20. Central to the general status of employee-directors must be the functions qua director and whether these constitute a "managerial function" within the meaning of section 1(3)(b). The Business Corporations Act in section 132(1) provides,

"The Board of Directors shall manage or supervise the management of the affairs and business of the corporation".

That section contemplates either direct participation by the Board in the "management of the affairs and business of the corporation" or a less direct participation through "supervision of the management of the affairs and business of the corporation". This contemplation, in our view, reflects the realities of corporate organization in that there may be wide variations in the degree to which a Board of Directors in any given instance participates in the management of the business. At one end of the spectrum may be the corporations (similar to that presently before us) where the Board comes together once annually to satisfy the requirements of corporate housekeeping and with the management of the business, during the intervening period being left completely in the hands of appointed full-time management: at the other end of the spectrum might be a corporation where all directors are also full-time employees and where each oversees a specific area of the business. In between these extremes, we believe, fall the majority of corporations where the Board of Directors comes together 6-10 times per year to review performance and to approve objectives and a wide range of general policies.

21. It is normal that a Board of Directors will rely for the effective implementation of approved objectives and policies, on a full-time senior executive which may be the President or the Chief Executive Officer. The extent to which such senior executive can act independently, without further referral to the Board, will be a matter of determination for the individual Board.

22. It appears to us that a Board of Directors fulfills its obligations under the Busi-

ness Corporations Act in a variety of ways which include the appointment of corporate officers and defining their responsibilities, approving short and long range corporate objectives, approving operating and capital budgets, approving a wide range of general policies and monitoring the performance of full-time management. Are such functions “managerial functions” in the sense in which the term is used in section 1(3)(b) of The Labour Relations Act?

23. This leads us to examining the meaning of “managerial” and therefore “management” in the context of The Labour Relations Act. The common everyday meaning of “management” in business and labour relations circles refers to the full-time hierarchy of executive and other employees who are charged with the responsibility of organizing, arranging, and directing the human, material and financial resources of the corporation to achieve the objectives set by the Board of Directors and within general policies approved by the Board. The sole reason for the existence of management is to implement the approved plans. The reason for exclusion of persons sharing in that responsibility of organizing and directing is to ensure that the implementation is not impeded by any conflicting interests of those involved. It must therefore follow that a person to be found to be exercising a “managerial function” must be one who is involved in the implementation function. This is a function which normally starts at the level of the President or Chief Executive Officer and is a function distinct from that of the Board of Directors which manages the business by setting of objectives and policies but does not directly participate in the organizing and directing of the resources.

24. It is evident that no generalization can be made about the status of employee-directors in respect to The Labour Relations Act. The Board considers it would be wrong to consider that in all cases an employee-director could be included in the bargaining unit and equally wrong in all cases to consider that he should be excluded. It must be a question of fact in each case as to whether the person in question does also exercise a managerial function.

25. Will the inclusion of Poirier within the bargaining unit in this case create a conflict of interest, such as is likely to impair the employer’s effective management?

26. The evidence is that Poirier came together, with his fellow directors once per year to review the financial health of the enterprise, to receive and evaluate the General Manager’s Report on the state of the business and to care for matters of corporate house-keeping. In our opinion the fulfilling of this function was not, in quality or in frequency, such as to create a conflict or impede the effective implementation of corporate objectives in the day-to-day management of the business.

27. It may be argued that a person in the position of Poirier would be likely to endeavour to influence Board action in a direction which would emphasize the employee interests disproportionately to those of the shareholders whose representative he is. But, bringing to bear judgments on many facets of an issue before the Board of Directors prior to decision would seem a desirable objective, and in any event in the facts of the present case it has no necessary carry over of conflict of interest into the management function of implementing the Board of Directors decision. It is well known that corporations do have persons acting as directors who may represent a wide diversity of interests and that in organizing such Boards, efforts are sometimes made to ensure that, as far as possible, signifi-

cant segments of economic and social interests viewed as important to the corporation, are represented. It is also well known that such representation may sometimes result in a direct conflict of interest which is guarded against by section 144 of the Business Corporations Act which states:

“Every director or officer of a corporation shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the corporation ...”.

28. There is the further protection that the Board acts only as a collective entity and only where a majority of the Board arrives at a consensus. Finally, there is the ultimate recourse of the shareholders to re-organize the Board if, in their view, its policies are not deemed to be in the best interests of all shareholders.

29. We therefore find that on the facts of this case the status of Poirier and of other employee-directors does not raise a conflict of interest such as is meant to be guarded against by section 1(3)(b). This situation may be more analogous to potential conflicts arising out of a family relationship such as was dealt with by the Board in *Hodgson Steel* [1976] OLRB Rep. June 312 wherein the Board says, at para. 10:

“... the statute says nothing about persons who may experience conflicts of interest because of a familiar relationship – with a manager, and thus the Board has held that such a relationship, in and of itself, is an insufficient basis for the exclusion of an individual”.

30. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

31. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for twenty-four hours or less, students employed during the school vacation period, and persons now covered by a subsisting collective agreement, constitute a unit of employees of the respondent appropriate for collective bargaining.

32. As a matter of clarification, it was agreed by the parties that the reference to “persons now covered by a subsisting collective agreement” was meant to cover those persons required to do work in the field at which time they are covered by a collective agreement with another union. The intention is that such persons will be covered by this certificate when employed in the bargaining unit.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 16, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER C. G. BOURNE:

1. I have to dissent from the decision of my colleagues.
2. From the evidence presented, it is clear that the application fails to meet the rigorous arms length relationship demanded by the Board in assessing an application in which there was participation by an employer, as set out in Section 12 of the Act.
3. In the instant case, R. Poirier, a yard employee, who is one of three employee/directors of the Company, actually led a delegation to the Union's office to organize the workers which has led to the present application. Poirier's actions in this regard clearly violates the Act in view of his position as Director. Section 132(1) of the Business Corporations Act states that:

“The Board of Directors shall manage or supervise the management of the affairs and business of the corporation.”

Section 139(1) amplifies matters by stating:

“The directors of a corporation are jointly and severally liable to the employees of the corporation to whom *The Master and Servant Act* applies for all debts that become due while they are directors for services performed for the corporation, not exceeding six months wages, and for the vacation pay accrued for not more than twelve months under *The Employment Standards Act*, and the regulations thereunder or *under any collective agreement made by the corporation.*”

(emphasis added)

4. Putting aside all considerations of motive, Poirier's leadership in instigating a union clearly puts the application under a shadow. This principle has been well expressed in the *Metal Textile of Canada* case [1971] OLRB Rep. Nov. at p. 695:

“There are two significant principles that may be discerned from the legislation and the cases in this area. First, there is the principle that a trade union maintain an arms length relationship with an employer. This avoids sweetheart arrangements or arrangements made between union and employer which are not to the full advantage of the employees. That situation is to be avoided because a non-arms length transaction leads to the reasonable inference that any resulting collective agreement or arrangement between the employer and the union will be detrimental to the employees. In that type of case it does not matter whether the employees are aware of the relationship between the employer and the union – that is of no moment. Even if the employees joined a manipulated or non-arms length union without knowledge of the employer's involvement this Board will not sanction the arrangements. Section 10 of The Labour Relations Act reflects the principle and prevents certification where there is a non-arms length transaction.”

See also *Canada Crushed Stone* [1977] OLRB Rep. Dec. at p. 814:

“Section 12 of the Act bars the certification of a trade union which has accepted the support of *‘any employer’*. The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of union support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union ‘qualified’ to act on behalf of those it seeks to represent.”

See also *Edwards & Edwards Ltd.* 52 CLLC ¶17,027 and *Veres Wire Industry Ltd.* [1976] OLRB Rep. July at p. 337.

5. Equally crucial to this determination is the consideration of how other employees would view an application from one who has been on the Board of Directors for a number of years and may be thought to be representing its wishes.

6. Taking all this into consideration, I would dismiss the application.

0785-77-R Labourers’ International Union of North America, Local 527, (Applicant), v. **The Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada**, Local Union No. 124, Ottawa – Hull, (Respondent).

Termination – Collective Agreement – Whether collective agreement void by reason of employer support of union – Whether union represented majority of employees when agreement entered into.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and C. G. Bourne.

APPEARANCES: A. M. Minsky, F. Manoni and B. Carozzi appearing for the applicant; D. J. Power, Catherine McLean and Jean Guy Denis appearing for the respondent.

DECISION OF THE BOARD: April 27, 1978

1. The applicant has applied to the Board under section 52 of The Labour Relations Act for (a) a declaration that the respondent is no longer, and never has been, entitled to represent the employees in the bargaining unit for which it has purported to act as bargaining agent; (b) a declaration that the purported collective agreement between the respondent and Capform Inc. (“Capform”) entered into by them on August 23, 1976, is not a collective agreement within the meaning of the Act; (c) an order terminating the purported agreement; and (d) such further and other relief as may be appropriate in the circumstances.

2. This application was filed with the Board on August 15, 1977. The respondent and the applicant agreed that the unit of employees which is affected by this application is:

All cement masons, foremen, journeymen, apprentices and helpers in cement finishing work on all concrete construction in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa – Carleton, all in the Province of Ontario.

3. In its application the applicant alleged that the purported collective agreement between the respondent and Capform was entered into on August 23, 1976. In its reply the respondent also asserted that its collective agreement was signed on August 23, 1976. However, at the initial hearing of the application, the respondent adopted the position that its collective agreement with Capform had been signed prior to August of 1976 and that this application was untimely.

4. The Board initially ascertained whether the applicant had the status to maintain this application. Having regard to the evidence before it and to the representations of the parties the Board determined that the applicant is a trade union which represented an employee in the bargaining unit within the purported collective agreement between the respondent and Capform within the meaning of section 52(1) of The Labour Relations Act. The Board further determines that the alleged collective agreement was executed on August 23, 1976. See the decision in this matter dated October 12, 1977. The Board therefore determined that this is a timely application.

5. In the course of presenting its evidence before the Board, the respondent led certain evidence which indicated that Capform had contributed financial or other support to the respondent within the meaning of section 40(a) of The Labour Relations Act. The status of the alleged collective agreement did not initially form a part of the applicant's position with respect to this application. However, when the respondent's evidence with respect to the date of execution of the alleged collective agreement indicated that Capform had contributed financial or other support to the respondent, the Board ruled that it would entertain evidence and representations from the parties with respect to the application of section 40(a). In this regard see the *W.N. Construction (Ottawa) Ltd.* case, [1968] OLRB Rep. August p. 458.

6. The evidence established that prior to August of 1976 Capform had remitted check-off to the respondent with respect to union dues and welfare fund payments with respect to its employees who worked in Ontario prior to the execution of the alleged collective agreement between the respondent and Capform. Various check-off return forms were proved in evidence. Each form clearly indicates the total number of hours worked in Ontario and Quebec for each employee and computes, among other things, the payments to the respondent's welfare fund based upon forty-five cents for each hour worked.

7. The respondent admitted that it received the check-off return forms in question and deposited the remittances in its various bank accounts. The respondent is involved in a form of collective bargaining with Capform in Quebec and no issue, of course, arises before this Board with respect to the respondent's conduct in Quebec. The respondent maintains separate bank accounts in Ontario and Quebec because the laws of Quebec require a separate accounting with respect to monies collected in that province. The respondent's practice is to maintain separate accounts with respect to monies originating in Ontario and Quebec.

8. The respondent's office secretary is responsible for processing the check-off forms and for banking the monies which are received from employers. It appears that the communication between the office secretary and the officers of the respondent with respect to processing the check-off forms does not extend to clearly defining which employers ought to be and which employers ought not to be remitting monies to the respondent. In addition, the evidence indicates that monies which should have been deposited in an account in one province were deposited in an account in another province. Relatively small amounts were involved and nothing sinister is to be attributed to such errors. However, such practices do indicate a lack of adequate control over the appropriate disposition of funds from Ontario and Quebec.

9. Prior to August 23, 1976, the respondent received check-off with respect to union dues, and welfare fund payments from Capform with respect to its operations in the geographic area of Ontario described in paragraph two. However, the Board finds that, during the period when such payments were received, the respondent genuinely believed that a collective agreement was in effect between the respondent and Capform with respect to the latter's operations in the geographic area of Ontario described in paragraph two.

10. Many decisions of this Board were cited in argument with respect to whether the alleged collective agreement between the respondent and Capform should be deemed not to be a collective agreement for the purposes of The Labour Relations Act having regard to the provisions of section 40(a). The decisions which were cited are based upon the provisions of section 40(a) or the analogous provisions of section 12. However, none of the decisions which were referred to the Board were based upon an identical or even similar factual situation.

11. The Board has always denied certification to a trade union where an employer has contributed financial aid to the organization prior to its certification. See, for example, the *Scott Haulage* case [1963] OLRB REP. January p. 422; the *Norfish Limited* case [1965] OLRB REP. September p. 414; and the *Crowe Foundry Limited* case, [1969] OLRB REP. May, p. 218. In addition, notwithstanding the more casual attitude in the construction industry towards the provisions of The Labour Relations Act when entering into "collective agreements", the Board stated in the *Drywall By Jamieson* case, [1965] OLRB REP. May, p. 99:

While we are not entirely unsympathetic to the plea of the applicant that, having regard to the practices and peculiar circumstances in the construction industry, exceptions should be made in cases involving unions and employers in that industry, in the light of the clear cut language of section 10 [now section 12], that plea is one that should be made to some other authority.

12. On the other hand, unusual factual situations are frequently present in the construction industry which require an examination of the degree of knowledge and belief of trade unions when either section 40(a) is raised as an impediment to the validity of an alleged collective agreement or section 12 as a bar to certification. For example, in the *Durable Drywall Ltd.* case [1970] OLRB Rep. December, p. 906, Company A and Company B were sister companies and money was sent in to the trade union for the check-off of union dues and for the welfare fund. Such money was paid by Company A with respect to em-

ployees who were on loan by Company A to Company B. The Trade union and Company A were bound by a collective agreement which contained a provision respecting the check-off of union dues and welfare fund payments. The trade union was never informed that the employees had been loaned from Company A to Company B. The cheques for dues and welfare came from Company A. Company B reimbursed Company A for any money that it paid on behalf of Company B to the trade union. At pages 909-911, the Board stated:

12. Having regard to the foregoing, the Board finds that the intervener received money from C. Romanelli Lathing Limited which represented union dues deducted from certain employees of the respondent. The Board also finds that the intervener was unaware of either the relationship between C. Romanelli Lathing Limited and the respondent or the arrangement between C. Romanelli Lathing Limited and the respondent for the loan of employees from one to the other. It is also quite clear that there was no collective bargaining relationship between the intervener and the respondent. Under these circumstances, has the conduct of the intervener disentitled it to certification? Section 10 [now section 12] of The Labour Relations Act states:

“The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry [age, sex] or place of origin”.

13. The Board has on occasions considered the provisions of section 10 [now section 12]. The majority of cases have involved newly-formed independent associations of employees where employers have contributed material or financial support to the association of employees with the knowledge of its employees during the association’s formation. This situation does not prevail in this application for certification, where the intervener has been the passive and unknowing recipient of financial support from the respondent after its formation as a trade union.

14. The views of the Board on section 10 have been set forth in the *Edwards & Edwards Limited* case, 52 CLLC, ¶17,027, where the Board stated:

“The unfair practice sections of the Act (including section 45 which prohibits the type of employer conduct referred to in section 9) [which latter section in its relevant parts was the predecessor of the present section 12] are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of section 12 which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at “company-dominated” trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be

considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned."

15. There was no evidence before the Board that the respondent has meddled in the affairs of the intervener or has sought to confine the broad rights conferred by section 3 so as to restrict the rights of the employees affected by this application. The dealings of the respondent with the intervener, in our opinion, are a reflection of the inter-related manner in which the commercial activities of the respondent and C. Romanelli Lathing Limited are conducted rather than an attempt by these two companies to either subvert or promote the organizational activities of the intervener.

16. It is our considered opinion that it could not have been the intention of the legislature that the deduction or remittance of union dues by C. Romanelli Lathing Limited on behalf of the respondent to the intervener in the circumstances stated above should have the effect of prohibiting the Board from certifying the intervener. The Board has taken into account the fact that the intervener was unaware of the existence of the respondent while the union dues were paid to it, that the conduct of the intervener was entirely passive in nature and that the financial support received by the intervener from the respondent did not occur during the period when the intervener was in the process of being organized.

17. In the result, therefore, the Board is satisfied that the conduct of the respondent and the intervener has not in the circumstances of this application for certification violated section 10 [now section 12] of The Labour Relations Act.

13. In the instant application the respondent's behaviour was passive. Moreover, while the Board has determined that the alleged collective agreement between the respondent and Capform was not in effect prior to August 23, 1976, the respondent was led to believe by the conduct of Capform that a collective agreement was in effect between them with respect to Capform's operations in the geographic area of Ontario described in paragraph two. The Board finds that the respondent relied upon assertions by Capform that it had executed a collective agreement and that the office secretary was not made aware of the fact that the supposedly executed collective agreement between the respondent and Capform with respect to the latter's operations in the geographic area of Ontario described in paragraph two had not been delivered to the respondent.

14. Where a trade union has a *bona fide* belief, based upon a factual situation which is

represented to it, that it is entitled to receive check-off with respect to union dues and welfare fund payments, such conduct does not constitute financial or other support to the trade union within the meaning of section 40(a). Accordingly, in all the circumstances of this application the Board is not prepared to find that the alleged collective agreement between the respondent and Capform is deemed not to be a collective agreement for the purposes of The Labour Relations Act by virtue of section 40(a).

15. The Board now considers the issue before it with respect to section 52. On August 23, 1976, the respondent employed two cement masons at its project at the Merrivale Shopping Centre in Ottawa. On the date of the execution of the alleged collective agreement, August 23, 1976, these two cement masons, Simone Fiorenze and Guiseppe Disipio were members of the respondent. However, on that date Capform also employed other construction workers at its project at the Merrivale Shopping Centre.

16. In order to establish its entitlement to represent the employees in the bargaining unit of "all cement masons, foremen, . . . , all in the Province of Ontario" within the meaning of section 52(3), the respondent is required to prove that it represented a majority of the employees in the bargaining unit at the time of the execution of the alleged collective agreement. See the *Spring Plastering Limited* case, [1967] OLRB REP. 887.

17. The Board heard evidence from Jacques Pilon who was employed by Capform as a foreman of labourers at the project at Merrivale Shopping Centre over a period of several months which included August 23, 1976. The applicant has a collective agreement with Capform with respect to all occupations listed therein working in or out of the counties of Carleton, Lanark, Russell and Prescott. Capform remitted check-off to the applicant pursuant to this collective agreement and during the month of August 1976 remitted check-off with respect to persons employed in such occupations at various projects in the counties of Carleton, Lanark, Russell and Prescott. There are thirty-one names on the employer contribution report from Capform to the applicant with respect to August of 1976. Mr. Pilon gave evidence that at that time about twenty labourers were working with him at the Merrivale project and independently identified the names of six of eight persons, namely, Jean-Louis Galipeau, Robert Potvin, Jacques Regimbal, Belamie Legace, Leo Lagage and Jean Yves Richard who were working on the cement finishing and concrete construction. The witness testified about the work which such persons performed for Capform at the Merrivale project during August of 1976.

18. Mr. Pilon informed the Board that the labourers did "everything" on the Merrivale project including concrete work and finishing the cement work with a float and patching. He further informed the Board that every member of his crew could perform and did perform such work. He also informed the Board that the members of crew also vibrated the cement, grouted the columns, and performed chipping and screeding at the project in question. Mr. Pilon also gave evidence that the two cement masons also patched walls during their employment at the Merrivale project.

19. Mr. Pilon gave his evidence in a forthright manner and it is clear that he is blessed with an excellent memory. His credibility was not shaken on cross-examination and where there is any divergence between Mr. Pilon's evidence and the testimony of Messrs. Andersen, Disipio and Fiorenze, the Board accepts the testimony of Mr. Pilon.

20. In the course of the evidence the respondent sought to adduce evidence as an aid to interpreting its own alleged collective agreement and the applicant's collective agreement which was executed prior to August 23, 1976. The Board was informed that this evidence would consist of certain agreements between the applicant, the respondent and their respective international trade unions, and certain decisions of the National Joint Board for the Settlement of Jurisdictional Disputes. The applicant opposed the introduction of such evidence on the grounds that such evidence was irrelevant and that the instant proceeding is an application to terminate bargaining rights and not a jurisdictional dispute. During the course of the hearing the Board ruled that the applicant's collective agreement is with Capform and that it was alleged by the respondent that such collective agreement required extrinsic evidence as an aid to its interpretation. The extrinsic evidence which the respondent proposed to introduce clearly did not touch upon the intentions of the parties to the collective agreement in question. Rather such evidence was with respect to the agreements of various other parties at a variety of dates and places. Moreover, it appeared that the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes were based upon considerations which went far beyond the language of the collective agreement in question. The Board further held that the introduction of extrinsic evidence is permitted where there is an ambiguity in the language to be construed. The Board stated that it was not prepared to find that the language in question was ambiguous and that in any event it appeared that none of the evidence which the respondent sought to introduce related to the intention of the applicant and Capform at the time of the signing of the agreement in question.

21. The Board also ruled during the hearing that this application involved a question of representation and that the Board was required to determine a question of representation in the context of an alleged collective agreement. The Board added that it was not concerned in this application with the merits of conflicts in jurisdiction which have engaged the applicant and the respondent for several years. The Board concluded its ruling by stating that it was not prepared to permit the respondent to adduce such evidence before it.

22. Section 52(3) provides that the onus of establishing that the trade union (in this case the respondent) was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement (in this case the respondent and Capform). Capform did not appear in this application and consequently the defence of the alleged collective agreement between the respondent and Capform remained with the respondent.

23. The evidence of Mr. Pilon established on the balance of probabilities that eight members of his crew were engaged in concrete work, finishing cement, vibrating cement, grouting, chipping and screeding. The bargaining unit in the respondent's alleged collective agreement, exclusive of geographic area reads, "all cement masons, foremen, journeymen, apprentices and *helpers in cement finishing work* on all concrete construction (emphasis supplied).

24. The onus rests with the respondent and it has established only that it represented two cement masons on August 23, 1976. The respondent has not established on the balance of probabilities that it represented a majority of the employees in the bargaining unit when helpers in cement finishing work are taken into consideration.

25. The respondent has failed to discharge the onus pursuant to section 52(3). Ac-

cordingly, the Board declares pursuant to section 52(1) that the respondent was not, at the time the agreement was entered into, namely August 23, 1976, entitled to represent the employees in the bargaining unit in the alleged collective agreement between the respondent and Capform.

26. The alleged collective agreement between the respondent and Capform which was executed on August 23, 1976, never was a collective agreement and emphasises the inherent difficulties of attempting to secure a collective agreement in the construction industry by means of voluntary recognition whilst engaged in a jurisdictional dispute with another trade union.

0380-77-U; 0381-77-U Labourers' International Union of North America, Local 493, (Complainant), v. **Municipality of Casimir, Jennings & Appleby**, (Respondent).

S-79 – Initiation of wage increase during S.70 freeze period without approval of municipal council – Whether wage increase granted “in error” can be revoked.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: *S.B.D. Wahl, David Henri and Rejean Parise appearing for the complainant/applicant; K.R. Valin and A. Brison appearing for the respondent.*

DECISION OF THE BOARD; April 19, 1978

1. File No. 0380-77-U is a complaint filed under section 79 of The Labour Relations Act which alleges that the Municipality of Casimir, Jennings & Appleby (“the municipality”) has violated sections 59(1) and 70(1) of the Act. File No. 0381-77-U is an application by Labourers' International Union of North America, Local 493 (“the union”) for consent to institute a prosecution against the municipality for its alleged breaches of sections 59(1) and 70(1). Both of these matters were heard by the Board at the same time.

2. The municipality is comprised of three geographic townships in North Eastern Ontario whose combined population is about 1,200. Service on the elected municipal council is not regarded as a full-time occupation, and indeed a number of the councillors commute long distances to jobs in larger centres. The person responsible for the daily operation of the municipality's business is the municipal clerk, who also doubles as the municipal treasurer.

3. The union filed an application for certification with respect to certain employees of the municipality on January 5, 1977. On January 11, 1977 the Board forwarded to the municipality notification of the application. No evidence was led at the hearing as to when the notification was actually received by the municipality. Apparently the municipal clerk would have been the one to actually receive the notice, and neither of the parties saw fit to call her as a witness.

4. On January 12, 1977, just prior to a formal meeting of the municipal council, members of council met with certain employees of the municipality to discuss the possibility of a wage increase. It appears that this type of meeting near the beginning of the year followed by a wage increase had become an annual occurrence. At the meeting the employees proposed that their wages be increased to match those being paid to certain employees of the Provincial Government. The council members made no commitment in this regard, but they did indicate that they felt that some wage increase was in order and that the matter would be dealt with by the council at its formal session. The evidence establishes that all wage increases for municipal employees have, at least in recent years, required the formal approval of the municipal council.

5. For some reason or other the municipal council never did get around to approving, or for that matter even discussing, a wage increase for the employees. However, when employees received their next regular pay cheque on January 15, 1977 the cheques were for an amount in excess of their normal wages. It appears that the municipal clerk was the one responsible for the increased amounts of the cheques. Whether the clerk was motivated by the mistaken belief that the events of January 12th were a sufficient basis upon which to implement a wage increase, or whether, as was suggested at the hearing, she was motivated by other considerations we are unable to determine. As noted above, the clerk was not called to testify.

6. On January 25, 1977 the Board issued a certificate to the union covering the employees who had received the increased pay cheques. The union sent the municipality a notice to bargain on February 1, 1977. By the time of the hearing the parties had already met with a conciliation officer but without being able to effect a collective agreement. No notice had yet been received from the Minister regarding either the appointment of a conciliation board or a decision not to appoint a conciliation board.

7. Mr. G. Gauthier, one of the members of the municipal council, testified that the council members had only become aware of the fact that increased wages were being paid to the employees in April of 1977, and then only because he happened to be reviewing the municipality's payroll records. The bi-weekly pay cheques which had included the higher wages had in fact been co-signed by both the municipal clerk and the reeve. However, it seems that the reeve had not been aware that increased amounts were being paid to the employees in that he had only assumed office on January 1, 1977, and thus had never had occasion to sign a pay cheque before that date. When members of the municipal council did discover that employees were being paid what they regarded as an unauthorized increase the clerk was directed to henceforth only issue cheques for the wage levels which the employees had been receiving prior to January. The employees involved were also approached and asked to sign a "wage deduction authorization" form which purported to allow the municipality to recover from them over a period of time the additional amounts which they had already received. The employees refused to sign the forms and apparently the municipality took no further action to collect the money.

8. It would perhaps be appropriate at this point, to set forth in full both sub-sections (1) and (2) of section 70:

70(1) – Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the con-

sent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employee,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of the conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

(2) – Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer or the employees until

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board, or withdrawn by the trade union.

9. There is no question but that the amounts received by employees in their pay cheques from January through March was reduced in April at a time when the “freeze” period provided for by section 70(1) was in effect. However, at the hearing the representative of the municipality contended that the sub-section had not been breached in that the municipality’s actions had been meant merely to correct the clerk’s mistake in over-paying the employees. The original action of the clerk, he submitted, had been improper both because it had not been authorized by the council and also because it was done in violation of the section 70(2) freeze which had been triggered by the application for certification.

10. Counsel for the union in support of his contention that the municipality had violated section 70(1) took the position that on the basis of “the indoor management rule” the action of the clerk in paying the higher wages must be regarded as an act of the municipality. With respect to the timing of the increased payments, counsel contended that the payments should be regarded as having commenced prior to the receipt of the notice of the application for certification by the municipality and thus prior to the onset of the section 70(2) freeze. In the alternative, submitted counsel, even if the increased payments had begun dur-

ing the section 70(2) freeze period, the fact that the union did not complain about the increases meant that they had been impliedly consented to by the union and thus had not been in violation of the section. As a third and final alternative counsel argued that if the increased wage payments had been implemented during the section 70(2) freeze, they constituted not a violation of section 70(2) but rather the municipality had been required by that very same section to pay the money to the employees in that the amount represented a customary annual increase which the employees were entitled to receive as a term or condition of their employment. In support of this position counsel referred the Board to its decision in *Hostess Food Products Ltd.* [1975] OLRB REP. March 210.

11. We would state at the outset that we do not regard the reasoning set out in the *Hostess* case as being applicable to the facts before us. Here the evidence does not suggest, as it did in the *Hostess* case, that prior to the advent of the section 70(2) freeze the municipality had set in motion a plan for the implementation of a wage increase of a determinable amount. Even at the meeting on January 12th there was no definite decision reached by the municipality and no promise made to the employees of a wage increase. Indeed it is clear that while the employees were informed that a wage increase was a distinct possibility they were also told that the matter could only be decided at a formal meeting of the council. This being the case we are satisfied that when the section 70(2) freeze came into effect it did not bring with it a requirement that the municipality implement any pre-existing plan for a wage increase.

12. At the hearing both parties put great stress on the question of whether the municipality had received notice of the union's application for certification before or after the effective date of the increased payments to the employees. We are of the view, however, that it matters not in this case when the municipality received the notification for the simple reason that there was in fact no alteration of employee rates of wages in January. Only the municipal council had the authority to alter employee wages, a fact which had been expressly made known to the employees. Against this background the action of the clerk in issuing pay cheques in excess of the established rates of wages did not, in our view, serve to create new rates of wages but instead represented only an overpayment above the established rates. It is possible that had the members of council become aware of the increased payments and not taken any immediate action it might be said that by their inaction they had impliedly authorized or somehow ratified the actions of the clerk. However, in this case the evidence shows that rather than accept the situation the council members upon becoming aware of the overpayments not only acted to ensure that they be brought to an end, but they also sought to recapture the excess amounts which had already been paid out.

13. Having concluded that the rates of wages of employees were not in fact increased in January 1977, but that employees only began to receive overpayments at that time, we are satisfied that the municipality's actions in April did not constitute a lowering in rates of wages but represented merely an attempt to ensure that employees not receive amounts in excess of the established rates. This being the case we are satisfied that the municipality did not breach section 70(1).

14. Before leaving the question of the alleged breach of section 70(1) we would stress that our determination in this regard arises out of the rather peculiar facts before us, namely a municipal corporation where only the council had authority to alter rates of wages and where the employees were aware that this was in fact the case.

15. With respect to the alleged breach of section 59(1) it was the submission of counsel for the union that the action of the municipality in trying to get the employees to sign the wage deduction authorization forms amounted to individual bargaining with the employees. We are unable to agree with counsel's assessment in this regard. Had the municipality in fact been seeking to get the employees to agree to new wage rates then a breach of the section may very well have been involved. However, here the municipality was seeking instead to recapture an overpayment to employees above their existing wage rates, and in our opinion this falls short of the meaning to be given to the phrase "bargain with or enter into a collective agreement with any person" as it is used in section 59(1).

16. Having regard to the above determinations, both of these applications are hereby dismissed.

1834-77-U United Garment Workers of America, (Complainant), v. The Bell Shirt Company Limited, (Respondent).

S-79 – Effect of pre-existing policy respecting payment of sick leave benefits – Failure to pay benefits during S.70 freeze period – Whether breach of S.70.

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members J.D. Bell and E. Boyer.

APPEARANCES: *Pamela A. Sigurdson for the applicant; S.P. Sibold and J. Kuntze for the respondent.*

DECISION OF THE BOARD; April 11, 1978

1. The complainant has complained that the grievor, William G. Nash, has been dealt with by the respondent contrary to the provisions of sections 70(1) and 58(a), (c) of The Labour Relations Act.

2. The complainant was certified on December 21, 1977 and notice to bargain was given prior to the dates material to this matter, January 23 and 24, 1978. The parties applied for conciliation on March 23, 1978.

3. The facts in this matter can be briefly stated. The grievor has been employed by the respondent for approximately 34 years, the last ten years of which the respondent has been managed and partly owned by Mr. Kuntze. The grievor has always been paid for the days he has been absent due to illness prior to the two days in question. On January 23 and 24, 1978 he was ill and absent from work and was not paid for the two days.

4. The evidence is clear that there was a group of employees who were paid for days they were absent due to illness and that the grievor was a member of this group. The group would appear to include both bargaining unit and non-bargaining unit personnel. The evidence also suggests that, on balance, the question of payment for sick days prior to January 23rd depended solely on membership in this group.

5. Mr. Kuntze testified that he decided not to pay the grievor for the days in question because he felt that he had been fair to the grievor by giving him some days off without pay between Christmas and New Year and because he felt he was being taken advantage of since the grievor had had two days sick leave with pay in November, and had been checking in late and checking out early. The evidence before us suggests that there was a very lax system of checking in and out and there is nothing to suggest that the grievor's behaviour had changed in the slightest over the past year or so. Further the grievor had been given days off without pay in the previous year between Christmas and New Year's so that would not appear to be an unprecedented event. The only other evidence of absence is the two sick days in November for which the grievor was paid. It seems difficult to credit that these things could lead Mr. Kuntze to conclude that the grievor was taking advantage of him. Mr. Kuntze was very candid in admitting that he felt betrayed when his employees joined the complainant union and it would appear reasonable to conclude on the basis of the evidence before us that he probably knew the grievor was a member of the union.

6. The onus rests on the complainant for the purposes of section 70 and on the respondent for the purposes of section 58(a), (c). Section 70(1) reads as follows:

"Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first."

On the basis of the evidence before us, we conclude that, on balance, sick leave with pay was granted automatically to all employees within a certain group chosen by the respondent. There was no evidence of the respondent ever exercising any discretion whether to pay for sick leave when any member of this group was absent due to illness. Therefore, at least insofar as it relates to this group of employees, payment for sick leave was, at the very least, a privilege enjoyed by its members. Section 70(1) would therefore apply and act to freeze

the situation and maintain the status quo until either of the conditions set out in paragraphs (a) and (b) have been met.

7. The evidence also indicates that there was a different attitude taken toward the payment of sick leave to the grievor after the complainant was certified. Further, the respondent's justification for denying the payment did not appear to be reasonable given the evidence outlined in paragraph 5 above. After sick leave with pay was denied him, the grievor had a conversation with Mr. Mason, the production manager, during which he told Mr. Mason he was a union member. Mr. Mason said that he had had a vague idea that the grievor was a union member, and it would also seem fair to say after Mr. Mason's testimony that there had been some speculation by Mr. Chisholm to some members of management as to who was a union member. In summary, there would appear to be sufficient evidence to suggest that the respondent's actions in denying the grievor sick leave were not free of discrimination against him because of his trade union membership, however, in view of our previous finding, it is not necessary to make such a determination in order to give the relief sought in this matter.

8. The Board finds that, in view of the unilateral alteration of the sick leave scheme by the employer during the period covered by section 70, the complainant should be granted the relief sought and orders:

- (1) that the grievor be paid for the two days (January 23 and 24, 1978) during which he was on sick leave at the appropriate rate of pay; and
- (2) that the respondent not vary the established sick leave scheme during the period covered by section 70.

The Board will remain seized of the matter for the purposes of assessing compensation if the parties are unable to agree.

0459-77-U Communications Workers of Canada, (Complainant), v.
Academy of Medicine, Toronto Call Answering Service, (Respondent).

S-79 – Interference with Trade Union – Employer closing down part of its operation in response to trade union organizing campaign – Board ordering payment of damages to employees and trade union – Measure of damages

BEFORE: Arthur Haladner, Vice-Chairman and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *Martin Levinson, James Hayes and Gerry Thompson for the complainant; D. M. McFayden, G. A. Smith, M. E. Wilson and T. E. Alderwich for the respondent.*

DECISION OF ARTHUR HALADNER, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY; April 27, 1978

1. In a decision dated December 28, 1977, the Board found that the Academy of Medicine had closed its Call Answering Service in violation of sections 56 and 58(a) and (c) and 61 of The Labour Relations Act, and that the employer's unfair practices had had an injurious effect on both the employees and the union. In order to remedy these unfair practices, the Board ordered the employer to reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights, such expenses to include the cost of proceedings before the Board. The Board also ordered the employer to pay to each of the employees, terminated as a result of the closure, a sum of money equivalent to the amount they would have earned from June 9, 1977 – the date of the closure – to September 9, 1977, such compensation to be computed on the basis of the employees' respective wage rates as of June 9th. This hearing was called for the purpose of determining the amount of compensation owing to the union and the employees.

2. At the hearing, the parties were in agreement that the union had incurred organizational expenses of \$491.38, negotiating expenses of \$2,323.14 and legal expenses of \$8,000.00, and that these expenses were reasonable. The Board, having regard to the agreement of the parties, orders that the employer pay to the union the above noted amounts.

3. The union claimed an additional \$1,075.00 in respect of miscellaneous legal costs. This \$1,075.00 included \$417.79 in respect of time spent in the preparation of documents for settlement discussions and Board hearings, \$407.60 in respect of time spent at settlement discussions and Board hearings, \$72.65 in respect of meal expenses and parking for witnesses and \$95.44 in respect of typing and photocopying of documents. The Board finds the above amounts to be reasonable in the circumstances and orders that the employer reimburse the union for same.

4. The major point of contention at the hearing concerned the union's claim for certain "other" expenses. The union claimed reimbursement for various strike expenses incurred in the period from May 20th – the date of the strike – to December 28th – the date of the Board's decision. These expenses were of three categories: (a) staff administration time (i.e., time spent by the union's staff during the period in question) (b) strike welfare payments (i.e., payments made by the union to employees performing picket duty who had no other source of income during the strike. These payments were in respect of rent, food, OHIP and prescription drugs) and (c) picket line disbursements (i.e., coffee, doughnuts and transportation for those employees performing picket duty.) With the exception of the payments made to two particular individuals, the employer did not dispute that the amounts claimed in respect of these three categories of strike expenses fairly represented the amounts actually expended.

5. Objection was taken, however, to the period for which the union was seeking compensation. The employer's position was that its liability in respect of the strike should have ended if not as of June 9th – the date on which the union received notice of closure, then as of the date of the filing of the complaint (June 14th) the date on which the union decided to seek legal redress from the Board. From that point on, at least, counsel argued, the union should be found to have picketed at its own expense. In defence of its claim, the union noted that its objective in continuing to picket (as disclosed by the evidence of its representative Gerry Thompson) was to secure a reopening by the employer of the Call Answering Service (hopefully with a collective agreement) even though it had purported to have

closed. The strike and the picketing which accompanied it was, counsel said, the legal activity of a union seeking to have its statutory rights continued, and could therefore be pursued concurrently with any legal remedy. The union was not required, counsel argued, “to put all its eggs in a legal basket.”

6. The Board does not consider the employer’s liability in respect of the strike to have ended by either the date of closure or filing. We are, however, of the view that the period for which the union is seeking compensation is excessive. Given the employer’s previously unfulfilled threats to employees to close down, and the absence of any prior consultation or notice of closure, the union was acting reasonably when, on June 9th, it did not take the employer’s notice of termination at face value. The filing of the complaint, while reflecting a concern that such notice might indeed be a true one, does not, in our view, constitute recognition on the part of the union that the employer had made, by June 9th, an irrevocable decision to close. At that time, the union was still justified in regarding the notice of termination with some suspicion. There did, however, come a point at which it should have been apparent to the union that the employer was not “bluffing” and that any assistance it might obtain, either on behalf of itself or the employees, would be obtained from litigation and not from further picketing. While not an easy one, the Board’s assessment of the situation, after considering the evidence before it, is that this point was reached by July 9th, one month after the closure. By that date, all efforts at accommodation had failed, and the Board had commenced hearings into the union’s complaint that the Call Answering Service had been shut down in violation of The Labour Relations Act. Moreover, by that date, the callboards had been removed and the employer had given evidence before the Board that it had no intention of reopening. In sum, while the union was legally entitled to continue picketing beyond July 9th, such picketing could not realistically have been expected to produce any tangible results. That being the case, the employer’s liability in respect of the strike must be found to have ended as of July 9th.

7. We propose, at this point, to deal with certain concerns expressed by counsel for the employer during the course of the hearing.

8. One of the effects of the employer’s unfair practices in this case has been to render the employees’ strike futile from the outset. It follows that the union should be reimbursed for the time spent by its staff up to July 9th – the point at which the futility of the strike should have become apparent. It is clear that the time spent by the union’s staff was diverted from other union activities to the prosecution of the strike. Compensation for staff administration time in the period from May 20th to July 9th is, therefore, appropriate as the measure of the union’s loss in this regard.

9. The welfare payments and picket line disbursements made by the union in this case, including the payments made to Laura Jackson, were all of the kind normally made by trade unions in strike situations. As such, they ought, subject to the time limitation established above, to be the subject of reimbursement unless clearly excessive – the Board is not inclined to second guess a trade union’s assessment of the welfare and picket line needs of its members. The welfare payments made to Laura Jackson were admittedly substantial. However, they were not, in the Board’s view, excessive, having regard to Mrs. Jackson’s family situation. As for the payments made to Ella Smith, the one non-complainant who received welfare assistance while picketing, although she was not employed by the employer at the time of the strike, she was terminated under questionable circumstances just three

months before. (See paragraph 17 of the Board's decision of December 28, 1977.) Moreover, her discharge was an issue in the strike. In these circumstances, the Board finds that the payments made to Miss Smith were not unreasonable.

10. For the foregoing reasons, the Board orders the employer to reimburse the union for its strike expenses incurred in the period from May 20th to July 9th. The Board will retain jurisdiction in the event the parties are unable to agree upon the amount of compensation owing.

11. Turning now to the issue of compensation for the discharged employees – because of the uncertainty attending the “closure” which occurred, as it did, shortly after the commencement of a lawful strike, and without prior consultation or notice, the Board finds that the employees are entitled to three months' wages, provided they have not abandoned their employment between June 9th and September 9th. The evidence establishes that none of the employees have abandoned their employment. They all considered themselves as being on strike up to and beyond September 9, 1977. The Board has already indicated that income from other employment should be deducted from the amounts payable to the employees. The Board finds that the payments received from the union should also be deducted. The Board is able, on the evidence before it, to determine the deductions in respect of other employment income. The Board does not have the necessary evidence regarding payments from the union and therefore directs the parties to make the appropriate deductions. We shall remain seized of the matter to resolve any disputes.

12. The Board orders that the employer pay to the employees the following amounts less deductions for payments received from the union:

– Laura Jackson	\$ 1,527.60
– Margaret Hill	1,527.60
– Eileen Bremner	1,527.60
– Rose Conseni	1,527.60
– Chris Barnett	1,527.60
– Carol Burke	1,527.60
– Eileen Martin	1,527.60
– Jackie Welch	1,527.60
– Roberta Keeley	1,373.60
– Marilyn Nickel	812.77
– Patricia Denomme	719.15
– Leila Moran	305.52

13. The Board's award of damages does not make allowance for UIC benefits received. It may be that employees receiving unemployment insurance benefits during the period in question are liable to the Unemployment Insurance Commission for repayment. But that is a matter between the employees and the Commission.

14. It should be recorded that all agreements made by the parties in connection with this matter were made without prejudice to the employer's right to seek judicial review of the Board's decisions.

CONCURRING DECISION OF MR. F. W. MURRAY:

I have reviewed the Board's decisions of December 28th and April 21st and concur in both.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I have read the decisions of the Board in this case and must, at the outset, say that I wholly agree with my colleague H. Simon in his dissent from the first majority award as to the amount of damages granted to the employees in this case. The majority decision would have employees gaze into a crystal ball to determine how long their rights under The Labour Relations Act actually last. Such an exercise subjects these important rights to an improper test unsupported by any language in the legislation.

2. Even within the parameters set by the first decision, I am unable to agree with the majority in the instant decision in limiting its award of damages to the union to one month after the closing of the answering service. Few of us in the daily practice of labour relations have not experienced the all too common employer threat to close down unless we knuckle under to his demands. The Labour Relations Act already severely restricts a union's right to engage in strike activity. The decision in this case adds to these restrictions a further restriction that, having finally been able to legally strike, the union must bear much of the burden of an employer's violating the Act by refusing to recognize two of its most fundamental principles – the principle of recognition and the duty to bargain in good faith.

3. I am also unable to concur in the majority's deduction of strike welfare payments from the amount owed by the employer.

0601-77-R International Brotherhood of Electrical Workers, Local Union 105, (Applicant), v. **Rondar Services Limited**, (Respondent), Group of Employees, (Objectors).

Certification – Jurisdiction – Constitutional Law – Employer engaged in repair and maintenance of equipment used by federal government facility involved in testing pollution in inland waters – Whether employees within provincial jurisdiction

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *S.B.D. Wahl, R. Arnold, L. Richmond and J. Jolliffe appearing for the applicant; D.L. Brisbin and G. Goodnough appearing for the respondent; G. Nickason and A. F. Cipolla appearing for the objectors.*

DECISION OF THE BOARD; April 10, 1978

1. In a decision dated August 30, 1977, the Board held that it had jurisdiction to entertain this application for certification. The Board stated that reasons would be given for assuming jurisdiction. These reasons are now set forth.

2. The respondent is a supplier of electrical and mechanical services. While the respondent performs work for a variety of customers, the employees who are affected by this application are working under a contract with Canada Centre for Inland Waters ("C.C.I.W.") through Environment Canada. This contract is for three years and covers repair and maintenance of electrical testing equipment which is used by C.C.I.W. The employees who are affected by this application spend between 70 and 75% of their time at C.C.I.W. The rest of their time is spent with other work for different customers who are clearly within the jurisdiction of the Board. The subject employees do not operate the equipment. Employees of C.C.I.W. operate this equipment. However, the subject employees may work alongside the employees of C.C.I.W. C.C.I.W. is a research facility which tests fresh water systems (including the Great Lakes and the Arctic) with respect to pollution, currents, wave action and levels of water and work closely with the International Joint Commission and the St. Lawrence Seaway. C.C.I.W.'s work has some relationship to navigation and fisheries. C.C.I.W. owns ships for research purposes including a static platform about half a mile off Burlington Beach.

3. Between 60 to 65% of the 70 to 75% is spent on new construction installation (from moving a wall plug to work on a large wharf). The work on ships is a minor component, for example, electrical work on ships which are owned by Environment Canada, C.C.I.W. or a third party. Maintenance work as opposed to construction work is between 35 to 40% of the 70 to 75%. The work performed by the respondent's employees varies from greasing and oiling existing machinery to changing light bulbs. The Ontario Fisheries Branch and the Ontario Ministry of Environment also share space in the same building as C.C.I.W. and some of the construction type work has been performed on their premises.

4. The respondent argued that the work of the C.C.I.W. was with respect to navigation and fisheries and that since its contract with C.C.I.W. related to navigation and fisheries the Board was without jurisdiction to entertain this application.

5. The Parliament of Canada may make laws in relation to all matters not coming within the classes of subjects by *The British North America Act, 1867*, as amended, assigned exclusively to the Legislatures of the Provinces. By virtue of section 91(10) and (13) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects of navigation and shipping and sea coast and inland fisheries.

6. The employees who are affected by this application are not employees of C.C.I.W. and they do not operate the equipment. The Board will assume, without deciding, for the purpose of argument, that the work of C.C.I.W. is work which comes within the classes of subjects set forth in section 91(10) and (13). In these circumstances, is the labour relations of the employees who are affected by this application governed by *The Labour Relations Act, R.S.O. 1970, c. 232*, as amended?

7. In *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al* (1967) 62 D.L.R. (2d) 270, a company before the Ontario Highway Transport Board operated a limousine service to and from a federally-owned airport. It was argued that because the company's business was that of carrying airline passengers and aircrew by motor vehicle transport to and from Toronto Airport which is under the ownership and control of the Government of Canada, such business was included in the field of aeronautics which is admittedly in the federal jurisdiction and therefore the company's business was exclusively

within federal jurisdiction. Donohue, J., referred to the reasons for judgment of Rand, J., in *Reference re Eastern Canada Stevedoring Co. Ltd.*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721, who pointed out that in a number of cases the enquiry has been whether a certain civil right was “truly ancillary” or “necessarily incidental” or “incidentally”. Donohue, J., referred to the following passage from the judgment of Rand, J., at pp. 548-9 S.C.R., p. 742 D.L.R.:

These phrases assume that legislation on a principal subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter is reasonably required for the purposes of the principal or to prevent embarrassment to the legislation, its inclusion to that extent is legitimate. This may be no more than saying that the incidental has a special aspect related to the principal. Actual necessity need not appear as the contracting out case shows; it is the appropriateness, on a balance of interests and convenience, to the main subject matter or the legislation.

8. In applying the approach of Rand, J., where he referred to the subordinate matter being reasonably required for the purposes of the principal, Donohue, J., queried whether the operation carried on by the company was a reasonably required one for the purpose of operating Toronto Airport. He reasoned that the transport of airline passengers and airline crew to and from Toronto Airport by the company was not reasonably required by Toronto Airport. Donohue, J., concluded that the Ontario Highway Transport Board should not be prohibited from exercising its jurisdiction and stated that the company's service furnished a primary, secondary and tertiary benefit. The primary benefit was to the passengers, the secondary benefit was to the airlines and the tertiary benefit was to the airport in the sense that it made their operation somewhat more orderly than would be the case if the airport were jammed with private motor vehicles and taxis. He concluded that the operation carried on by the company was not reasonably required by the federal authority. In *Reference re Eastern Canada Stevedoring Co. Ltd.*, *supra*, Kellock, J., at S.C.R. p. 748, stated that persons performing merely casual services upon or in connection with a Dominion “undertaking” would not necessarily fall within the ambit of federal jurisdiction.

9. Even allowing for the wide construction usually given to the term “navigation and shipping” under head 10 of section 91, see *City of Montreal v. Montreal Harbour Commissioners* [1926] A.C. 299, 312 and *Reference re Eastern Canada Stevedoring Co. Ltd.*, *supra*, S.C.R. p. 534-535, the Board is of the view that the repair and maintenance of the testing equipment which is used by C.C.I.W. constitutes a casual service to the operations of C.C.I.W. and that the operation carried on by the respondent, so far as it relates to the C.C.I.W., is neither “truly ancillary” nor “necessarily incidental” to the federal jurisdiction under section 91(10) and (12).

10. For the foregoing reasons the Board finds that the labour relations of the employees who are affected by this application and the operations of respondent with respect to C.C.I.W. are governed by The Labour Relations Act.

11. The Board appointed a Labour Relations Officer to inquire into and report on the list of employees and the duties and responsibilities of Anthony Cipolla, Robert Sylva,

Garry Nickason and Brian Millie. In a meeting which was conducted by the Labour Relations Officer, the parties who were present signed an agreement that these four persons should not constitute part of the bargaining unit and therefore would not be on the list of employees who were at work on the date of the filing of this application.

12. In these circumstances the Board further finds that all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 18, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

1692-77-R Canadian Union of Operating Engineers & General Workers, (Applicant), v. **York Central Hospital**, (Respondent), Employee, (Objector).

Certification – Bargaining Unit – Union already representing operating engineers craft unit and seeking additional unit of maintenance employees – Remainder of service employees unrepresented – Whether proposed unit appropriate

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members C.G. Bourne and A. Hershkovitz

APPEARANCES: *L. Haiven and Vince McManus for the applicant; Carl Posluns for the respondent; no one appearing for the employee objector.*

DECISION OF THE BOARD; April 3, 1978

1. This is an application for certification. The applicant is seeking to be certified to represent a bargaining unit of mechanical maintenance employees employed by the respondent at its hospital in Richmond Hill. The respondent contends that such a bargaining unit would be inappropriate. The applicant is already the bargaining agent for a craft unit of stationary engineers and their helpers employed by the respondent.

2. At the hearing the applicant indicated that if it were to be certified for a unit of mechanical maintenance employees it would seek an agreement with the respondent to merge this unit with the existing unit of stationary engineers. The applicant contended that

such a scheme had the support of most of the mechanical maintenance employees as evidenced by the fact that 7 of the 8 employees involved had signed applications for membership into the union.

3. Section 6(1) of The Labour Relations Act requires that the Board in certification applications determine “the unit of employees that is appropriate for collective bargaining.” In carrying out this mandate the Board recognizes that the wishes of employees is a factor to be considered. However, the wishes of any particular group of employees must at times compete with other matters of industrial relations policy. With respect to public hospitals, these matters include a concern that employees not become unduly fragmented into too many bargaining units and also that any bargaining units which are established be capable both of withstanding the passage of time and also of forming a basis upon which solid collective bargaining relationships can be built. (These concerns are discussed at length in the *Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459, where for the first time the Board was required to determine a policy with respect to bargaining units of “paramedical” employees.)

4. To date the Board has found separate hospital units of nurses, office staff, paramedical personnel and service employees (generally described in terms of “all employees” save and except certain exclusions) to be appropriate for collective bargaining purposes. As a general practice the Board will include both stationary engineers and maintenance staff in the service or “all employee” unit. (See: *Brockville General Hospital*, (1957) 57 CLLC ¶18,061.) The major departure from this practice occurs when a craft union of stationary engineers, such as the applicant, applies to be certified only for a group of stationary engineers who are not already included in any other unit. In such a situation the Board will deem a craft unit of stationary engineers to be appropriate. This, however, is not done pursuant to the Board’s general power under the Act to determine appropriate bargaining units but rather follows from the special status accorded to craft unions under section 6(2) of the Act. But while the Board will in the appropriate circumstances define craft units of stationary engineers, in the hospital field it will not generally define bargaining units either in terms of maintenance employees alone or maintenance employees together with stationary engineers.

5. At the hearing the representative of the applicant contended that the Board should grant the unit being requested because of the affinity of the maintenance employees with the stationary engineers and also because both groups are supervised by the same managerial person. This same argument was raised by the applicant some 13 years ago in the *St. Mary’s General Hospital* case, [1965] OLRB Rep. Sept. 401. At the time the Board rejected the argument as an acceptable basis for departing from its established practice of including maintenance employees in a service unit. We see no reason to now reach a different conclusion with respect to this point.

6. At the hearing the representative of the applicant referred to Wellesley Hospital as being an example of where the Board in the past had certified the applicant for a unit comprised of both stationary engineers and maintenance employees. The decision in that case is reported at [1967] OLRB Rep. Feb. 45. A reading of this decision makes it plain that in that case the applicant was seeking to displace a local of the International Union of Operating Engineers in a situation where that union and Wellesley Hospital had entered into a collective agreement covering both classifications of employees. The Board in consid-

ering the situation before it determined that it would adhere to its general policy in displacement situations of certifying the applicant for the same unit already represented by the incumbent union. The Wellesley decision was clearly based on the peculiar facts involved in that case, and is not of any persuasive value in these proceedings.

7. The applicant in this case is seeking to organize beyond its usual unit of craft employees. While there is nothing in the Act prohibiting it from doing so, it does so without the benefit of any special status and thus is subject to the same policy considerations that affect all other unions organizing in the hospital field. The Board's policy is that the appropriate bargaining unit in a case such as this is nothing less than an "all employee" service unit. The applicant has raised no grounds which might cause the Board to depart from this policy in the instant case. Thus the Board is not prepared to find a unit of mechanical maintenance employees to be appropriate for collective bargaining.

8. It is apparent that with respect to any unit of the respondent's employees which might be found to be appropriate for collective bargaining, the applicant does not have as members at least 45 per cent of the employees who would come within such a unit. As a result, this application is hereby dismissed.

1099-76 International Federation of Professional and Technical Engineers, A.F. of L., C.I.O., C.L.C., (Applicant), v. **Canadian General Electric Company Limited**, (Respondent), International Union of Electrical Workers, and its Local 599, (Intervener).

Certification – Employee – Effect of Board decision on managerial status made 24 years ago – Whether Board bound by previous decision – Whether res judicata

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *H. Goldblatt and A. Olling for the applicant; L. Bertuzzi, J. Reynolds, B. Martin and J. Roffey for the respondent; Stephen Grant and Tom Knimmo for the intervener.*

DECISION OF THE BOARD; April 6, 1978

1. This is an application for certification.

2. The Board has not found in any previous proceeding that the applicant under the name of International Federation of Professional and Technical Engineers is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act. The applicant contends that it has merely changed its name from the American Federation of Technical Engineers, an organization which has established its union status with the Board. At the next hearing the applicant will be given the opportunity to present evidence to substantiate that submission.

3. The International Federation of Professional Engineers has applied to be certified as the exclusive bargaining agent for all cost estimators (classes I and II) and cost analysts at the respondent's plant in Peterborough.

4. By way of objection to this application, the respondent has raised the plea of *res judicata* alleging that because of a previous decision rendered by the Board, the Board is now precluded from certifying the persons in question.

5. In 1954, Local 166 of the American Federation of Technical Engineers applied to be certified as the exclusive bargaining agent for, among other categories of employees, wage rate analysts and senior cost clerks in the employ of the respondent at Peterborough. The status of the employees in the two named categories was challenged; the Board endorsed the record with the following decision:

I find that wage rate analysts and senior cost clerks in the employ of the respondent at Peterborough are persons who come within the provisions of section 1(3)(b) of the Labour Relations Act and that accordingly such persons are not employees for the purposes of the Act.

Counsel for the respondent contends that because of this endorsement of the record 24 years ago, the Board is now estopped from enquiring into the section 1(3)(b) status of any persons within the employ of the respondent falling within the categories of wage rate analyst and senior cost clerks or their present equivalents unless, since the 1954 decision, there has been a relevant change in either the law or the duties and responsibilities exercised by these persons. It is freely admitted by counsel for the respondent that to trigger this argument he must satisfy the Board that the categories of those applied for in the present application, cost estimators and cost analysts, are identical to the categories of wage rate analysts and senior cost clerks applied for in 1954.

6. Counsel for both the applicant and intervener, on the other hand, contend that the plea of *res judicata* cannot succeed in this case. Firstly, it is argued that the respondent cannot establish two of the prerequisites of the plea: 1) that the decision of the Board was final and 2) that the parties to the 1954 decision are the same as the parties to the instant proceeding. Secondly, counsel assert that even if the above criteria are met, the plea is not applicable in this case because there has been either a change in law or a change in the duties and responsibilities exercised by the persons occupying the classifications in question or both. Finally, counsel take the position that even if the formal criteria are met and even if there has been no change in law or fact, the Board has the discretion to decline to apply the plea and should exercise that discretion in the circumstances of this case. For all these reasons the applicant and intervener urge the Board to look directly to the present duties and responsibilities of the cost estimators and cost analysts to determine whether or not they are employees within the meaning of section 1(3)(b) of the Act and to sidestep entirely the respondent's plea of *res judicata*.

7. At the hearing the parties requested an interim direction on the applicability of *res judicata* and an indication of upon whom the various burdens of proof involved in this matter will fall.

8. The variety of terminology used by tribunals, courts and writers over the years in

discussing the principles of *res judicata* has caused some confusion. In *The Doctrine of Res Judicata* (London, Butterworths, 2nd ed., 1969) at pp. 2-5, Bower and Turner have sought to clarify some terms and eliminate others by setting up the following nomenclature. They use the term "*res judicata*" as a phrase of general application covering two basic principles. Firstly, a judicial decision precludes a party to the litigation from disputing as against the other party or parties thereto in any subsequent litigation the findings of law or fact made in the earlier decision. This doctrine extends to all matters of fact and law which the judgment necessarily established as the legal justification for the conclusion reached by the judicial body. This aspect of *res judicata* has been termed by Bower and Turner as "*estoppel per rem judicatam*". Because the estoppel may relate to either the cause of action or a single issue therein, the two different aspects of this first principle of *res judicata* are referred to as "*cause of action estoppel*" and "*issue estoppel*". The second principle embodied in the general phrase *res judicata* has been termed "*merger in judgment*" and provides that by virtue of the judgment the right or the cause of action set up in the suit is extinguished or merged in the judgment which is pronounced. Accordingly, no further recovery or claim may be made upon the same cause of action in a subsequent proceeding between the same parties or their privies. This principle makes it necessary for a plaintiff to claim all relief related to the cause of action at one time and prevents subsequent efforts to invoke the assistance of the courts in the same cause. Likewise, the principle requires a defendant to put forth all his defences in the initial proceeding.

9. The claim raised by the respondent in this case is one in the nature of issue estoppel. It is alleged that because the issue of the status of the persons in question under section 1(3)(b) of the Act was determined in 1954 it may not now be relitigated. There are two principles upon which a plea of estoppel is based: firstly, the right of an individual to be spared the vexatious duplication of suits and prosecutions at the instigation of an opponent with greater resources, wealth or power and secondly, the protection of the interests of both the litigants and the community by ensuring a final and conclusive resolution of disputes between parties.

10. A party seeking to establish issue estoppel, or cause of action estoppel, either as a bar to his opponent's claim or as a foundation of his own case, must establish all of the following elements:

- a) that the decision in question was a "judicial decision" as that term is understood in law,
- b) that the particular decision relied upon was in fact pronounced as alleged,
- c) that the tribunal pronouncing the decision had jurisdiction to do so,
- d) that the decision was final,
- e) that the decision was, or involved, a determination of the same question as that sought to be contraverted in the litigation in which the estoppel is raised, and
- f) that the parties to the decision, or their privies, were the same persons

as the parties to the proceeding in which the estoppel is raised, or their privies, or, if it should be found that they were not, that the decision was conclusive *in rem* and, therefore, binding as against any and all future parties.

(See generally Bower and Turner (supra), pp. 18-19 and Sopinka and Lederman, *The Law of Evidence in Civil Cases* [Toronto, Butterworth, 1974] pp. 365-366.)

11. The parties agree that the first three conditions have been met. As well, the parties agree that the issue involved in the 1954 decision is the same as the issue involved in the instant case, that is, whether the persons in question are excluded from collective bargaining by operation of section 1(3)(b) of the Act. This aspect of the dispute therefore, centres on the remaining criteria: 1) whether a decision of the Board is sufficiently final, and 2) whether there is either a sufficient identity of parties or, if not, whether the 1954 decision was conclusive *in rem*.

12. Concerning the finality of the Board's decisions, the parties agree that the 1954 decision was a final decision of the Board as opposed to an interim or temporary decision. Counsel for both the applicant and intervener contend, however, that because of the Board's wide powers of reconsideration embodied in section 95(1) of The Labour Relations Act, no decision of the Board is sufficiently final to satisfy the criterion of finality which is a condition precedent to the application of *res judicata*.

13. An examination of the Board's jurisprudence reveals that the Board has taken the view that a plea analogous to *res judicata* is properly applicable to the Board's decisions and that its decisions must be given finality. For example, in *Arnold Markets Limited*, 62 CLLC ¶16,221, the Board held that a previous finding between the parties that an employee had been discharged contrary to the Act was binding in a subsequent case between the same parties in which the union challenged the validity of the representation vote held a few days after the discharge. Similarly, in *Holland River Gardens Company*, 64 CLLC ¶16,304, the Board refused to allow the respondent in a second certification application to challenge the employee status of the employees since the Board had determined that question in the initial application. As well, in *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Sept. 722, and *Arthur G. McKee and Company Canada Limited*, [1976] OLRB Rep. Oct. 637, the Board held that the respondents were estopped from contesting the unlawfulness of their actions in a consent to prosecute application by virtue of previous decisions by the Board involving the same parties and the same events in which the Board found that the respondents had authorized and/or engaged in an unlawful strike.

14. In *Arnold Markets Limited*, (supra), the Board endorsed the application of *res judicata* with the following statement at p. 992:

It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must ac-

cept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision.

As well, in *Holland River Gardens Company Ltd.*, (supra) at p. 1256, the Board stated that *res judicata* should apply to Board decisions notwithstanding their powers of reconsideration:

While the Board recognizes that its decisions do not carry the mantle of judgments given by a Court, and that its decisions are subject to reconsideration under section 79(1), [now 95(1)] it has within these limits, and in a proper case, recognized the necessity for the application to its decisions of a principle analogous to that of *res judicata*.

15. The Board's use of a doctrine analogous to *res judicata* is not inconsistent with its power to reconsider its own decisions. Board decisions may be distinguished from the type of decision cited by Bower and Turner, supra, at pp. 132 and 138 where subsequent revisions based on changing circumstances between the parties may be found to cause a want of finality for the purposes of *res judicata*. An example of this type of decision would be certain matrimonial orders whereby the amount of alimony or maintenance is periodically revised in view of subsequent developments between the parties. The majority of reconsideration cases before the Board relate to the state of things prior to the Board's hearing rather than to subsequent events. Because of the importance of enabling parties to rely on Board decisions as final decisions, the Board does not normally assume the role of an ongoing guardian of the equities of a decision or remedy. Instead, developments occurring after a decision may call for a new application before the Board. However, in *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. Sept. 549, the Board dealt with one of the more unusual circumstances where the Board looked to the possibility of reconsidering its remedy based on subsequent events. As may be seen, however, from the excerpt from p. 551 quoted below, a very stringent standard was set by the Board as a prerequisite to re-opening the case. For the Board to reconsider in view of subsequent circumstances it is not sufficient to merely show a change in circumstances; the Board held that the change had to render the original order clearly inappropriate:

The reduced significance of the reliance interest in a case such as this one [where the remedial exercise was not so much concerned with determining rights and obligations as with rectifying bad bargaining practices], however, does not mean that the Board should entertain a request for reconsideration just because events have arisen after its decision. To adopt such an approach would permit every bargaining complaint to be reconsidered, providing a party with opportunity to either repair, or reargue, the case that it has already presented. In order to prevent such an abuse of process, a party seeking reconsideration of a bargaining order on the basis of events occurring after the Board's decision must establish convincingly that subsequent events have altered substantially the bargaining situation so as to make the Board's initial order clearly inappropriate. It should be made clear that the onus upon the party seeking reconsideration in these circumstances is not a light one. Once the Board has carefully reviewed a bargaining situation and

issued a remedy, the Board must be convinced that there has been a substantial alteration in the pattern of conduct that it has already reviewed before it will reinsert itself into the negotiations.

16. Furthermore, and perhaps most importantly, The Labour Relations Act itself makes it clear that the decisions of the Board are to be considered final and binding even though they may be revised. Section 95(1) provides,

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and *the action or decision of the Board thereon is final and conclusive for all purposes*, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(emphasis added)

17. Accordingly, because the Board has set a strict standard for reconsideration and because the Act clearly indicates that its decisions are to be considered final and binding unless and until revised, the Board is satisfied that the Board's powers under section 95(1) of the Act raise no want of finality and that a doctrine analogous to *res judicata* is properly applicable to the Board's decisions.

18. We turn now to a consideration of the final criterion: was the 1954 decision an *in rem* decision or, if not, does the instant application involve the same parties or their privies?

19. *The Canadian Encyclopedic Digest*, 10 CED (Ont. 3d) p. 151 defines an *in rem* decision as follows:

A judgment in rem is universally binding. It is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it concludes [sic] all persons from stating that the status of the thing adjudicated upon was not that declared by the adjudication. Judgments in rem are conclusive against all the world, not only as to the res itself but also as to the grounds on which the tribunal professes to decide, or may be presumed to have decided.

The Board's 1954 decision dealt with the status of the persons in question as employees under the Act. It was, therefore, a decision of general application or analogous to an *in rem* decision. This decision was binding upon all persons and not just between the parties to that proceeding. It follows, therefore, that the respondent in this case need not prove that the parties to that decision were the same as the parties to these proceedings.

20. Having regard to the above findings, the Board is satisfied that the respondent has established the basic prerequisites to the application of *res judicata*. Two factors that would negate the application of an otherwise successful plea of *res judicata*, however, would be either a material change in the law or a significant change in the facts since the original deci-

sion. In the Board's view, since the respondent has established the basic prerequisites to the plea, the applicant and intervener are now responsible for satisfying the Board that these alleged changes have in fact occurred in this case.

21. Concerning a change in the law, we note that since 1954 statutory amendments have been made to section 1(3)(b) of the Act. In 1954 section 1(3)(b) excluded from the category of those deemed to be employees persons who were managers or superintendents as well as those who exercised managerial functions or were employed in a confidential capacity in matters relating to labour relations. The section as it stood in 1954 reads as follows:

For the purposes of this Act, no person shall be deemed to be an employee,

- (b) who is a manager or superintendent or who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Since then the section has been narrowed to cover only those who exercise managerial functions or who are employed in a confidential capacity. Presently the section reads:

1-(3) ...no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The 1954 endorsement of the record does not state upon which of the four possible grounds the Board concluded that the individuals in question were not employees for the purposes of the Act; there is no indication as to whether it was because they were managers, superintendents, exercised managerial functions, or were employed in a confidential capacity in matters relating to labour relations. Today they could only be excluded under the last two categories.

22. Counsel for the respondent contends, however, that senior cost clerks and wage rate analysts could not have been classified as either managers or superintendents and that the Board in 1954 must have determined the matter on the same criteria it would use today, that is, on whether or not the employees in question exercised managerial functions or were employed in a confidential capacity.

23. In addition to a change in statutory law, it must be recognized that the Board's jurisprudence has not remained static. The Board's interpretation of The Labour Relations Act is a continuing process. Principles are not established by a single decision. Rather, they evolve over the passage of time as the Board responds to ever changing fact situations. Through this process, developments have occurred in the Board's approach to the managerial exclusions over the past 25 years. (See for example *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. 261, *Inglis Limited*, [1976] OLRB Rep. June 270, *The Globe & Mail Limited*, [1976] OLRB Rep. Nov. 662, and G. W. Reed, *White-Collar Bargaining Units*, 1969, Industrial Relations Centre, Queen's University, Kingston, Ontario p. 27.

24. The statutory changes to section 1(3)(b) of the Act since 1954, viewed together

with the manner in which Board principles evolve over time, satisfies the Board that a *prima facie* case that there has been a relevant change in the law has been made out by the applicant and intervener. At its next hearing, therefore, the Board will afford the respondent an opportunity to present evidence and argument to answer the *prima facie* case.

25. Concerning a change in fact, can it be said that there has been a relevant change in the duties and responsibilities of the classifications in question since the Board's determination 24 years ago? It is clear that the names of the classifications dealt with in 1954 have been changed since the earlier determination. The change of name at least gives rise to an inference that there might have been some changes in the content of these jobs. In these circumstances, the Board considers that it is incumbent on the respondent to introduce some evidence to show that these jobs have remained the same. At its next hearing the Board will entertain evidence and argument from the parties as to whether or not a relevant change in the duties and responsibilities of persons occupying the classifications in question has in fact taken place.

26. Finally, we turn to the applicant's contention that even if the Board finds that there has been an insufficient change in law or fact to displace the plea of issue estoppel, the Board has the discretion to decline to apply the plea and should exercise that discretion in this case. As an administrative tribunal charged with the administration of The Labour Relations Act, the Board is mindful that there may be situations where a strict application of the doctrine of *res judicata* must be tempered by industrial relations realities. At this stage of the proceedings, however, it is premature for the Board to consider whether in this case it should exercise its discretion in the manner requested.

27. This matter is referred to the Registrar to schedule a hearing to deal with the outstanding matters involved in this phase of the application before the Board. Those matters include,

- a) representations relating to the applicant's *status* as a union,
- b) whether or not the *classifications* in issue in 1954 (wage rate analyst and senior cost clerks) are identical to the classifications in issue in the instant application (cost estimators, class I and II, cost analysts and cost technicians),
- c) evidence and argument the respondent may wish to present to rebut the presumption raised by the applicant and intervener that there has been a relevant *change in the law* as well as evidence and argument the applicant and intervener may want to bring in response,
- d) evidence and argument from the parties relating to the issue of whether or not there has been a *change in the duties and responsibilities* exercised by persons occupying the classifications in question since the Board's determination in 1954, and
- e) argument on the Examiner's report. Because a determination of whether or not there has been a change in duties and responsibili-

ties necessarily requires a close examination of the existing duties and responsibilities, the Board at its next hearing will entertain full argument based on the Examiner's report as it relates to the present status of the individuals in question under section 1(3)(b) of the Act.

CASE LISTINGS MARCH 1978

	Page
1. Applications	
(a) Bargaining Agents Certified	65
(b) Applications Dismissed	77
(c) Applications Withdrawn	80
2. Application under Section 1(4)	81
3. Applications for Declaration Terminating Bargaining Rights	81
4. Applications for Declaration that Strike Unlawful	82
5. Application for Declaration that Lock-Out Unlawful	82
6. Applications for Consent to Prosecute	82
7. Complaints under Section 79 (Unfair Labour Practice)	83
8. Applications under Section 55	85
9. Applications for Determination under Section 95(2)	86
10. Reference to Board Pursuant to Section 96	87
11. Applications under Section 112a	87
12. Applications for Reconsideration of Board's Decision	88

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1978

BARGAINING AGENTS CERTIFIED DURING MARCH

No Vote Conducted

1123-77-R: St. Catharines Typographical Union Local 416 of the International Typographical Union (Applicant) v. The St. Catharines Standard Limited (Respondent).

Unit: "all employees of St. Catharines Standard Limited, located at 17 Queen Street, St. Catharines, Ontario, employed in the Circulation Department, save and except the Circulation Manager, the Circulation Promotion Manager, persons above the rank of Circulation Manager and Circulation Promotion Manager, the Circulation Sales Manager Trainee, persons employed for not more than 24 hours per week and students regularly employed during the school vacation period." (10 employees in the unit).

1180-77-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Travellers School Transit Limited (Respondent).

Unit #1: "all employees of the respondent working at or out of its Etobicoke – North York Branch located at 564 Evans Avenue in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, driver trainers-route supervisors, dispatchers, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (39 employees in the unit).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at or out of the respondent's Etobicoke-North York Branch located at 564 Evans Avenue in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, driver trainers-route supervisors and dispatchers." (140 employees in the unit).

1232-77-R: The Association of Professional Student Services Personnel (Applicant) v. The Halton Board of Education (Respondent).

Unit: "all psychometricians, social workers, attendance counsellors and child care workers in the employ of the respondent in the Regional Municipality of Halton save and except supervisors, persons above the rank of supervisor, psychologists and persons regularly employed for not more than twenty-four (24) hours per week." (24 employees in the unit).

1400-77-R: United Steelworkers of America (Applicant) v. Canada Carbon and Ribbon Company, Limited (Respondent) v. Canadian Textile & Chemical Union (Intervener).

Unit: "all employees of Canada Carbon and Ribbon Company, Limited in Brighton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (19 employees in the unit).

1452-77-R: Canadian Union of Public Employees (Applicant) v. Travelways School Transit Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at Hamilton who are regularly employed for not more than twenty-four hours per week and students who are employed during the school vacation period, save and except managers, persons above the rank of manager and office and sales staff." (54 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

(*Bargaining Unit #1 – See Application Certified Subsequent to Post-Hearing Vote*).

1460-77-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Scugog (Respondent).

Unit: "all employees of the Works Department of the Corporation of the Township of Scugog, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit).

1490-77-R: Canadian Union of Public Employees (Applicant) v. Spruce Lodge Home for the Aged (Respondent) v. Employees (Objectors).

Unit: "all employees of the respondent at Stratford, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (56 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

1571-77-R: Hotel, Motel, Restaurant Employees' and Beverage Dispensers' Union Local 757 (Applicant) v. Societe Italiana Di Benevolenza Principe Di Piemonte (Respondent).

Unit: "all employees of the respondent employed at the Da Vinci Centre, Thunder Bay, save and except manager and persons above the rank of manager, confidential secretary and persons regularly employed for not more than 24 hours per week." (16 employees in the unit).

1585-77-R: Service Employees International Union – Local 183 (Applicant) v. Extendicare Ltd. (Respondent) v. Ontario Nurses' Association (Intervener).

Unit #2: "all persons regularly employed by the respondent for not more than 22½ hours per week and students employed during the school vacation period at the respondent's nursing home at 114 Starwood in Ottawa, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and persons covered by subsisting collective agreements." (36 employees in the unit).

(*Bargaining Unit #1 – See Application For Certification Dismissed – No Vote Conducted*).

(*Bargaining Unit #3 – See Application Certified Subsequent to Post-Hearing Vote*).

1608-77-R: Local Union 785 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. McPeople Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1627-77-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Jim Walter Building Products Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all office and clerical employees of the respondent at Barrie, save and except supervisors, persons above the rank of supervisor, secretary to the President, cost accountant, personnel clerk, salesmen, engineers, and engineering staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (25 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

1651-77-R: Pharmacists and Professional Employees Association, Local 1976, Chartered by Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Madoc Manor Lodge and Retirement Home (Respondent).

Unit: “all employees of the respondent at Madoc, Ontario regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, students employed during the school vacation period and persons covered by subsisting collective agreement.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1696-77-R: Retail Clerks Union, Local 409, Chartered by the Retail Clerks International Union (Applicant) v. Economart (Division of Westfair Foods Ltd.) (Respondent).

Unit: “all employees of Economart (Division of Westfair Foods Ltd.) in the Municipality of Thunder Bay who are not covered by subsisting collective agreements, save and except store manager and persons above the rank of store manager.” (3 employees in the unit).

1698-77-R: Oilburner Servicemen’s Association (Applicant) v. Shell Canada Limited (Respondent).

Unit: “all oil burner service contractors employed by the respondent working at or out of Metropolitan Toronto.” (39 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

1706-77-R: United Steelworkers of America (Applicant) v. Automatic Cutting and Finishing Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Hamilton, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for less than twenty-four (24) hours per week and students employed during the school vacation period.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

1713-77-R: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL – CIO – CLC (Applicant) v. M.J. McLaughlin Foods Co. Ltd. (Respondent).

Unit: “all employees of the respondent in Alliston, save and except foremen, persons above the rank of foreman, self employed brokers, office staff and sales staff.” (10 employees in the unit).

1721-77-R: Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Pur-Pak Meats Ltd. (Respondent).

Unit: “all employees of the respondent, at its plants at Belfield Drive, Metropolitan Toronto, save and except foremen and persons above the rank of foreman, office staff and sales staff.” (16 employees in the unit).

1722-77-R: Service Employees International Union, Local 183, AFL-CIO-CLC (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent at the Trenton Memorial Hospital, employed for not more than twenty-four (24) hours per week, save and except the executive housekeeper, dietitians, student dietitians, supervisors, persons above the rank of supervisor and employees covered by subsisting agreements with the applicant." (14 employees in the unit).

1728-77-R: United Steelworkers of America (Applicant) v. NWS Welding Supply (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except plant manager, persons above the rank of plant manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1731-77-R: Christian Labour Association of Canada (Applicant) v. Pat Sheppard Driver Pool (Respondent).

Unit: "all employees of the respondent working at or out of Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff." (6 employees in the unit).

1733-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. H. G. Susgin Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1741-77-R: International Union of Operating Engineers, Local 772 (Applicant) v. Tricil Limited (Respondent) v. Canadian Union of Public Employees, Local 5 (Intervener).

Unit: "all employees, employed by Tricil Limited located at its plant (formerly called S.W.A.R.U.) at 470 Kenora Avenue, Hamilton, Ontario in the regional municipality of Hamilton-Wentworth, save and except supervisors, those above the rank of supervisor, office personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in the unit). (*Having regard to the agreement of the parties*).

1746-77-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. Hoover Haulage Ltd. (Respondent).

Unit: "all truck drivers in the employ of the Respondent in the City of Nanticoke, in the Regional Municipality of Haldimand-Norfolk." (2 employees in the unit).

1749-77-R: Ontario Nurses' Association (Applicant) v. Rest Haven Private Hospital (Respondent).

Unit: "all registered and graduate nurses employed by the Rest Haven Private Hospital, Hamilton, in a nursing capacity, save and except the Administrator and persons above the rank of Administrator." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1754-77-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Leperre and Sons Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1756-77-R: Canadian Union of Public Employees (Applicant) v. Rest Haven Private Hospital (Respondent).

Unit: "all employees of the respondent at 83 Emerald Street South, Hamilton, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, supervisors, persons above the rank of supervisor and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1764-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sanbarry Interiors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1765-77-R: The Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261, Ottawa, affiliated with the A.F.L., C.I.O. and C.L.C. (Applicant) v. Holiday Inn of Ottawa Centre of the Commonwealth Holiday Inns of Canada Limited (Respondent).

Unit: "all banquet employees of the respondent at its premises on 100 Kent Street, Ottawa, save and except banquet supervisor, persons above the rank of banquet supervisor and persons covered by a subsisting collective agreement between the applicant and the respondent." (35 employees in the unit). (*Having regard to the agreement of the parties*).

1766-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Delaware Nursing Home (1977) Inc. (Respondent).

Unit: "all employees of the respondent in the Township of Delaware who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, registered physiotherapists, registered occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and employees who are covered under subsisting collective agreements." (10 employees in the unit). (*Having regard to the agreement of the parties*).

1778-77-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 666, 136 Oakdale Avenue, St. Catharines, Ontario (Applicant) v. MacPherson Mechanical Ltd. (Respondent) v. Employee (Objectors).

Unit: "all Journeymen and Apprentice Plumbers in the employ of the Respondent save and except non-working foremen and persons above the rank of non-working foreman in the Regional Municipality of Niagara and the County of Haldimand." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1780-77-R: The Canadian Union of Public Employees (Applicant) v. Bayview Villa Nursing Home (Respondent).

Unit: "all employees of Villacentres Limited at the Bayview Villa Nursing Home in Willowdale, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, technical personnel, office staff, supervisors and persons above the rank of supervisor." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1783-77-R: The Canadian Union of Public Employees (Applicant) v. Bayview Villa Nursing Home (Respondent).

Unit: "all registered and graduate nurses regularly employed for not more than 24 hours per week at Bayview Villa Nursing Home in Willowdale, Ontario." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1784-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Franklin Lumber Co. Limited (Respondent).

Unit: "all employees of the respondent employed at its premises at 170 Beverly Street, Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff." (8 employees in the unit).

1788-77-R: International Ladies' Garment Workers' Union (Applicant) v. Savgo Knits Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, mechanics, sales and office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1796-77-R: The Canadian Union of Public Employees (Applicant) v. The Parking Authority of the City of Hamilton (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at 80 Main Street West, Hamilton, Ontario, save and except supervisors and those above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1797-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Pembroke, Ontario, save and except dispatchers, persons above the rank of dispatcher, and office and sales staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1798-77-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except dispatchers, persons

above the rank of dispatcher, and office and sales staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1799-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. The Metropolitan Trust Company (Respondent).

Unit: “all employees of the Respondent engaged in cleaning and maintenance at ‘The Continental’ 55 Erskine Avenue, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (2 employees in the unit).

1806-77-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Empire Store Fixtures Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

1807-77-R: Canadian Union of Public Employees (Applicant) v. Youville Nursing Home (Respondent).

Unit: “all lay employees of the Youville Nursing Home at Pembroke, Ontario save and except Professional Medical Staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, therapists, clerical staff, supervisors and persons above the rank of supervisor.” (15 employees in the unit).

1809-77-R: United Steelworkers of America (Applicant) v. Alcan Canada Products Limited (Respondent).

Unit: “all employees of the respondent employed at its premises at 191 Evans Avenue, Toronto, save and except supervisors, foreman and persons above those ranks, office and sales staff and students employed for the school vacation period.” (102 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

1811-77-R: Service Employees’ Union, Local 210 affiliated with S.E.I.U., – A.F.L. – C.I.O. – C.L.C. (Applicant) v. Central Park Lodges of Canada (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity at Central Park Lodges of Canada at Windsor, save and except assistant managers and persons above the rank of assistant manager, and persons regularly employed for not more than twenty-four hours a week.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses regularly employed in a nursing capacity by Central Park Lodges of Canada at Windsor for not more than twenty-four hours a week, save and except assistant managers and those above the rank of assistant manager.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

1815-77-R: Toronto Typographical Union No. 91 (Applicant) v. Web Offset Publications Limited (Respondent).

Unit: “all employees of Web Offset Publications Limited at the Municipality of Metropolitan To-

ronto employed in composing room work, save and except non-working foremen, persons above the rank of non-working foreman and students employed during the school vacation period.” (22 employees in the unit).

1818-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Drake Construction Co. Ltd. (Respondent).

Unit: “all employees of the respondent at Squaw Bay, in the District of Thunder Bay, save and except non-working foreman and persons above the rank of non-working foreman.” (3 employees in the unit).

1821-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Wright Abrasives Inc. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Hamilton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during a school vacation period.” (13 employees in the unit).

1822-77-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen of America (Applicant) v. George Lanthier & Fils Ltee (Respondent).

Unit: “all office employees of the respondent employed at Alexandria, Ontario, save and except office manager and controller, and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

1824-77-R: Ontario Public Service Employees Union (Applicant) v. Corporation of the County of Kent (Respondent).

Unit: “all outside employees of the Corporation of the County of Kent save and except foremen, persons above the rank of foreman, office, clerical and technical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (32 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision (1978) OLRB Rep. March).

1833-77-R: The Association of Employees for the Mentally Handicapped at Countryside (Applicant) v. North Halton Association for the Mentally Retarded (Respondent).

Unit: “all counsellors employed by the respondent at its Countryside residence at Trafalgar Road North, Hornby, Ontario, save and except the Director.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

1836-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at ‘10 Palisades’, 10 San Romanoway, Downsview, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1850-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Work-

ers of America, (UAW) (Applicant) v. S.G. McLean, c/o Apex Metals (Kitchener) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (28 employees in the unit). (*Having regard to the agreement of the parties*).

1870-77-R: United Steelworkers of America (Applicant) v. Roper Canada Limited Roper Eastern Division (Respondent).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (44 employees in the unit).

1885-77-R: Canadian Union of Public Employees (Applicant) v. The Manitoulin Centennial Manor (Respondent).

Unit: "all employees employed for not more than twenty-four (24) hours per week and students employed during their vacation period of the Manitoulin Centennial Manor at Little Current in the District of Manitoulin save and except supervisors, persons above the rank of supervisor, professional Medical Staff, Graduate Nursing Staff and Assistant Administrator." (20 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2095-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Frid Construction Company Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervener #2) v. Ontario Provincial Conference I.U.B.A.C. (Intervener #3).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent engaged in cement finishing work in the industrial, commercial and institutional sector in the Counties of Halton, Wentworth and Haldimand, and the Townships of Caistor, North and South Grimsby in the County of Lincoln, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list	5
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener # 1	0

1388-77-R: Canadian Paperworkers Union (Applicant) v. Kleen-Stik Products Limited (Respondent).

Unit: "all employees of the respondent at Mississauga save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (85 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	82
Ballots segregated and not counted	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	38

1553-77-R: Employees' Association of Kodak Canada (Applicant) v. Kodak Canada Ltd. (Respondent) v. United Steelworkers of America (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and in the City of Brampton, save and except foremen, persons above the rank of foreman, cafeteria employees, office staff, factory clerical staff, technical staff, marketing staff, persons employed in the "Film Emulsion Research, Development and Formulae Department" and in the "Paper Emulsion Research, Development and Formulae Department", chemical laboratory staff, security guards, employees at the respondent's facilities in Don Mills, Ontario, the Customer Equipment Service Division, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (1252 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	1213
Number of persons who cast ballots	1114
Ballots segregated and not counted	0
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	646
Number of ballots marked in favour of intervener	462

1655-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Gillies-Guy, Division of CFMG Inc. (Respondent).

Unit: "all office and clerical employees of the respondent working in the respondent's offices at Ancaster, Ontario, Guelph, Ontario, 660 Victoria Avenue North, Hamilton, Ontario and 110 James Street South, Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the President, payroll supervisor, sales staff, messenger, employees employed for not more than 24 hours per week, and those employees covered by subsisting collective agreements with Teamsters Local 879." (31 employees in the unit).

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	11

1693-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. North York General Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all Stationary Engineers and Air Conditioning Operators employed in the Boiler Room and persons primarily engaged as their Helpers, employed by North York General Hospital in Metropolitan Toronto, save and except Chief Engineer and persons above the rank of Chief Engineer." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	4

1707-77-R: United Steelworkers of America (Applicant) v. Wallace Barnes Company, Limited Associated Spring Operations Barnes Group (Respondent) v. Canadian Springmakers' Union No. 175 N.C.C.L. (Intervener).

Unit: "all hourly rated employees of the respondent at Hamilton and Burlington, Ontario, save and except foremen/women, assistant foremen/women, office staff, technical staff, office janitors, truck drivers, watchmen/women, apprentices and persons above the rank of foreman/woman." (205 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		193
Number of persons who cast ballots		165
Number of ballots marked in favour of applicant	155	
Number of ballots marked in favour of intervener	10	

Applications Certified Subsequent to Post-Hearing Vote

1255-77-R: The Hotel and Club Employees' Union, Local 299, Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Cara Operations Limited, Urban Restaurants and Inns Division, Operating the Cara Inn (Respondent).

Unit: "all employees of the respondent's Urban Restaurants and Inns Division operating the Cara Inn employed at 6257 Airport Road, Malton, Ontario, save and except Chefs, Sous-Chefs, Assistant Housekeepers, Bar Managers and Supervisors, persons above the rank of Chef, Sous-Chef, Assistant Housekeeper, Bar Manager and Supervisor, office and sales staff (including front desk office staff, accounting staff, secretaries, switchboard operators and security staff), students employed during the school vacation period, employees employed for not more than 24 hours per week and persons employed by the Retail Store Division located in the news and gift store." (114 employees in the unit).

Number of names of persons on list as originally prepared by employer		76
Number of persons who cast ballots		69
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	48	
Number of ballots marked against applicant	20	

1452-77-R: Canadian Union of Public Employees (Applicant) v. Travelways School Transit Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent employed at Hamilton, save and except managers, persons above the rank of manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (53 employees in the unit).

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots		53
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	31	
Number of ballots marked against applicant	20	

(*Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted*).

1519-77-R: Service Employees International Union – Local 183 (Applicant) v. Extendicare Ltd./Kingston (Respondent).

Unit: "all persons employed for less than 22½ hours per week and all students employed during the school vacation period in the employ of Extendicare Ltd. in Kingston, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	8	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	1	

1551-77-R: Office Professional Employees International Union (Applicant) v. Racine, Robert and Gauthier Reg'd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the City of Ottawa, save and except managers and persons above the rank of manager." (32 employees in the unit).

Number of names of persons on list as originally prepared by employer		38
Number of persons who cast ballots	31	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	13	

1585-77-R: Service Employees International Union – Local 183 (Applicant) v. Extendicare Ltd. (Respondent) v. Ontario Nurses' Association (Intervener).

Unit #3: "all persons regularly employed by the respondent for not more than 22½ hours per week and all students employed during the school vacation period at New Orchard Lodge, in Ottawa, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and persons covered by subsisting collective agreements." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	0	

(Bargaining Unit #1 – See Application For Certification Dismissed – No Vote Conducted).

(Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted).

1645-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sims Cabs Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working in its operation at Long Sault, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (61 employees in the unit).

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	56
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	24

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0186-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. United Concrete Floor Division of Mediterranean Floor Finishing Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener). (3 employees).

1517-77-R: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by the Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Kentwood Nursing Home Limited (Respondent) v. Canadian Union of General Employees, Local 503 (Intervener). (20 employees).

1518-77-R: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by the Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Westlake Nursing & Convalescent Home (Respondent) v. Canadian Union of General Employees, Local 503 (Intervener). (22 employees).

1584-77-R: Service Employees International Union – Local 183 (Applicant) v. Beacon Hill Lodges of Canada Limited (Respondent) v. Ontario Nurses' Association (Intervener). (57 employees).

1585-77-R: Service Employees International Union – Local 183 (Applicant) v. Extendicare Ltd. (Respondent) v. Ontario Nurses' Association (Intervener).

Unit #1: "all persons regularly employed by the respondent for not more than 22½ hours per week and all students employed during the school vacation period at its Medex Nursing Centre in Ottawa, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and persons covered by subsisting collective agreements." (33 employees in the unit).

(Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted).

(Bargaining Unit #3 – See Application Certified Subsequent To Post-Hearing Vote).

1782-77-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Doulton China of Canada Limited (Respondent) v. Group of Employees (Objectors). (57 employees).

1795-77-R: Canadian Union of Public Employees (Applicant) v. St. Joseph's Hospital, Toronto (Respondent). (140 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1826-76-R: Graduate Assistant's Association (Applicant) v. Carleton University (Respondent) v. Carleton University Support Staff Association (Intervener).

Voting Constituency: "All employees of the respondent in Ottawa, employed as teaching assistants, demonstrators, part-time or sessional lecturers, markers, research assistants or associates, and service assistants, who are graduate students enrolled in the Faculty of Graduate Studies or undergraduate students at Carleton University, excluding employees covered by collective agreements, with Canadian Guards' Association, Local 103; C.U.P.E., Local 796, Graphic Arts International Union, Local 224, the Carleton University Support Staff Association, and the Carleton University Academic Staff Association." (977 employees).

Number of names of persons on revised voters' list		977
Number of persons who cast ballots		496
Ballots segregated and not counted	26	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	222	
Number of ballots marked against applicant	245	

2094-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Robertson-Yates Corporation Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervener #2) v. Ontario Provincial Conference I.U.B.A.C. (Intervener #3).

Voting Constituency: "All employees of the respondent engaged in cement finishing work in the commercial, industrial and institutional sector, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Halton, Wentworth and Haldimand and the Townships of Caistor and North and South Grimsby in the County of Lincoln." (2 employees).

Number of persons on revised voters' list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #1	1	

1091-77-R: United Brotherhood of Carpenters and Joiners of America, AFL, CIO, CLC (Applicant) v. Premium Forest Products Ltd. (Respondent).

Voting Constituency: "All employees of the respondent at its plant in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (305 employees).

Number of names of persons on list as originally prepared by employer		300
Number of persons who cast ballots		273
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	272	
Number of segregated ballots cast by persons whose name appear on voters' list	1	

Ballot Boxes Sealed

1478-77-R: Canadian Textile and Chemical Union (Applicant) v. Harding Carpets Limited, Collingwood, Ontario (Respondent) v. Amalgamated Clothing and Textile Workers Union (Intervener).

Voting Constituency: "All employees of the respondent at Collingwood, save and except fixers, assistant foremen, persons above that rank, industrial nurse office staff and security guards." (384 employees).

Number of names of persons on revised voters' list	382
Number of persons who cast ballots	329
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	329

Ballot Box Sealed

1491-77-R: Le Syndicat Des Employés Du Droit Limitée (CSN) (Applicant) v. Le Droit Ltée (Respondent) v. Ottawa Typographical Union, Local 102 (Intervener #1) v. Le Syndicat Canadien de la Fonction Publique et Sa Section Locale 1499 (Intervener #2).

Voting Constituency: "All employees of Le Droit Ltee at Ottawa, Ontario, employed in its newspaper plant save and except non-working assistant foremen, those persons above the rank of non-working assistant foreman, persons covered by a subsisting collective agreement entered into between Le Droit Ltee and Le Syndicat des Journalistes of Ottawa effective from January 1, 1976 until December 31, 1977; those persons covered by a subsisting collective agreement entered into by Le Droit Ltee and the Ottawa Typographical Union, Local No. 102 (representing all employees of the commercial plant of Le Droit Ltee) certified on October 3rd, 1975, effective from July 1st 1975 until December 31, 1977, those persons covered by a subsisting collective agreement entered into by Le Droit Ltee and Canadian Union of Public Employees and its Local 1499, effective from May 1st, 1976 until December 31, 1977; and those persons covered by a subsisting collective agreement entered into between Le Droit Ltee and the bargaining unit number 1 as set out in paragraph 1 of The Ontario Labour Relations Board's amended decision dated February 11th, 1974, effective from January 1, 1976, until December 31, 1977." (101 employees).

Number of names of persons on revised voters' list	101
Number of persons who cast ballots	93
Number of ballots marked in favour of applicant	42
Number of ballots marked in favour of intervener	51

Certification Dismissed Subsequent to Post-Hearing Vote

1515-77-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Halton (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in The Regional Municipality of Halton in its Halton Centennial Manor at Milton, save and except supervisors and those above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate and student dieticians, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and/or on a co-operative study program at university college." (233 employees in the unit).

Number of names of persons on list as originally prepared by employer		235
Number of persons who cast ballots	200	
Ballots segregated and not counted	6	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	80	
Number of ballots marked against applicant	111	

1550-77-R: United Steelworkers of America (Applicant) v. Work Wear Corporation of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company at Barrie, and Owen Sound, save and except foremen, persons above the rank of foreman and office staff." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	11	

1643-77-R: United Steelworkers of America (Applicant) v. Canadian Racing Plate Company Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Niagara Falls, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (44 employees in the unit).

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	32	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	25	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1684-77-R: Service and Commercial Employees Union, Local No. 272 (AFL-CIO-CLC) (Applicant) v. The Ottawa Board of Education (Respondent) v. The Ottawa Board of Education Employees Association (Intervener). (830 employees).

1735-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Conenco International Ltd. (Respondent). (2 employees).

1794-77-R: Hotel & Motel and Restaurant Employees Union, Local 893, Atikokan, Ontario (Applicant) v. Little Falls Community Centre, Atikokan, Ontario (Dining Room and Lounge) (Respondent) v. Group of Employees (Objectors). (13 employees).

1819-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Cadillac Fairview Corporation Limited (Respondent). (6 employees).

1913-77-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Chi-Can Freight Forwarding Ltd. (Respondent). (11 employees).

1928-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dafoe Metalicrete Floor Company (Respondent) v. Local 598 of the Operative Plasterers and Masons International Association of the United States and Canada (Intervener). (19 employees).

1930-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Duron Ontario Ltd. (Respondent) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener). (22 employees).

1957-77-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Haldimand-Norfolk (Respondent). (81 employees).

APPLICATION UNDER SECTION 1(4)

1740-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. W. N. Construction (Ottawa) Limited W. N. Holdings Limited (Respondents). (2 employers).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1545-77-R: Steve Harastovic and the employees of Jutras Die Casting Ltd. (Applicant) v. The United Steelworkers of America (Respondent) v. Jutras Die Casting Ltd. (Intervener). (*Granted*).

Unit: "all employees of the Jutras Die Casting Ltd. in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff and employees regularly employed for twenty-four hours per week or less." (48 employees in the unit).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots		48
Number of spoiled ballots	3	
Number of ballots marked in favour of Respondent	13	
Number of ballots marked against Respondent	32	

1558-77-R: Elton Dament et al (Applicant) v. Labourers International Union of North America Local 493 (Respondent) v. Sportspal Enterprises Limited (Intervener). (*Granted*).

Unit: "all employees of the intervener employed at Callander, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	7	

1616-77-R: Peter Exarchakos (Applicant) v. The Canadian Union of Blind & Sighted Merchants, Local 681, SEIU, AFL, CIO, CLC (Respondent) v. Kay Stratigeas (Intervener). (5 employees). (*Granted*).

1689-77-R: Mr. Denys Griffith (Applicant) v. The Workers Union of Queen Elizabeth Hospital (C.N.T.U.) (Respondent) v. V.S. Services Q.E. Hospital (Intervener). (78 employees). (*Dismissed*).

1793-77-R: Diana Michaelis, Judy Mallory, Gail Woodbeck and Gordon Haxton (Applicants) v. The Canadian Union of Public Employees, Local 1527 (Respondent). (6 employees). (*Terminated*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1761-77-U: Boart Hardmetals (Canada) Limited (Applicant) v. Wolfgang Hock, James Steel, John Phillips, John Seddon, Jamie Couterman, and Clifford Hicks (Respondents). (*Withdrawn*).

1762-77-U: Boart Hardmetals (Canada) Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 1256, Frank Kenny, Wolfgang Hock, James Steel and John Phillips (Respondents). (*Withdrawn*).

1772-77-U: Boart Hardmetals (Canada) Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 1256, Frank Kenny, Wolfgang Hock, James Steel and John Phillips (Respondents). (*Withdrawn*).

1773-77-U: Boart Hardmetals (Canada) Limited (Applicant) v. Wolfgang Hock, James Steel, John Phillips, John Seddon, Jamie Couterman, and Clifford Hicks (Respondents). (*Withdrawn*).

1869-77-U: Dayton Tire Canada Ltd. (Applicant) v. Those Persons Named in Scheduled "A" Attached Hereto (Respondents). (*Withdrawn*).

1944-77-U: Consolidated Bathurst Packaging Limited (Applicant) v. International Woodworkers of America, Local 2-76, Allan Strickland, Lloyd Cox and those persons listed in Schedule "A" attached (Respondents). (*Withdrawn*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1959-77-U: Christian Labour Association of Canada (Applicant) v. Rayco Stamping Products Limited (Respondent). (*Dismissed*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1421-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. 312024 Ontario Limited, Harry Rotenberg Real Estate Ltd. and Harry Rotenberg (Respondents). (*Withdrawn*).

1600-77-U: Ontario English Catholic Teachers Association, Essex Branch Affiliate (Applicant) v. Essex County Roman Catholic Separate School Board (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0952-75-U: Tom Conlan (Complainant) v. Canon Ltd., Eastern Structural Division (Respondent) v. Canadian Workers Union (Intervener). (*Dismissed*).

1828-76-U: George Fazzari (Complainant) v. Canadian Steelworkers Union, Atlas Division (Respondent) v. Peter Taylor (Intervener). (*Dismissed*).

2024-76-U: Birchcliffe Nursing Home (Complainant) v. Service Employees Union, Local 204 and Eugene R. Laliberte (Respondent). (*Withdrawn*).

2137-76-U: Upholsterers' International Union of North America A.F.L.-C.I.O. (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

0144-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. Sunnybrook Food Markets Limited (Respondent). (*Withdrawn*).

0145-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. Sunnybrook Food Markets Limited (Respondent). (*Withdrawn*).

0146-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. Sunnybrook Food Markets Limited (Respondent). (*Withdrawn*).

0147-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. Sunnybrook Food Markets Limited (Respondent). (*Withdrawn*).

0198-77-U: Upholsterers' International Union of North America A.F.L.-C.I.O. (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

0326-77-U: United Steelworkers of America (Complainant) v. Jet Welding and Ornamental Iron Works Inc. (Respondent). (*Granted*).

0848-77-U: Ontario Public Services Employees Union (Complainant) v. Blackadar Nursing Home Limited (Respondent). (*Dismissed*).

0956-77-U: D. Brown, M. Davidson, Blair Evans, Noel Goulet, Frank Hanlon, Paul Kowalczyk, Earle Robinson (Complainants) v. Consolidated Sand and Gravel, Company, (a division of Standard Industries Ltd.) (Respondent). (*Granted*).

1060-77-U: Paul Griffen, Peter Thibodeau, Jerry Cherette, Larry Warner, Tony Hyska, Gerald Moran, Robert Butler, Bruce Robinson, James Corcoran, Antonio Alpharan, Bernie Tessier, William Swayze, Vince DiPalo, Davis Webb, Roy McLeod and Jim Knight (Complainants) v. Unit Rig & Equipment Co. (Respondent). (*Dismissed*).

1420-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. 312024 Ontario Limited, Harry Rotenberg Real Estate Ltd. and Harry Rotenberg (Respondents). (*Withdrawn*).

1472-77-U: Andrew Zahorourski (Complainant) v. Murphy Tobacco Ltd. (Respondent). (*Dismissed*).

1536-77-U: Union of Canadian Retail Employees CLC (Complainant) v. Rose and Laflamme Limited (Respondent). (*Withdrawn*).

1554-77-U: Anthony Frank Amis, a member of Local 598 of the Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada (Complainant) v. International Representative William E. McMynn, appointed Trustee of Local Union 598 by General President Joseph T. Power of the Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada (Respondent). (*Withdrawn*).

1649-77-U: United Steelworkers of America (Complainant) v. Slot-All Limited (Respondent). (*Dismissed*).

1666-77-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Courtesy Disposal Co. Inc. (Respondent). (*Withdrawn*).

1676-77-U: Peter George (Complainant) v. United Steelworkers of America Local 2859 Babcock & Wilcox Canada Ltd. (Respondent). (*Dismissed*).

1712-77-U: Mervyn C. McReynolds (Complainant) v. Fleet Manufacturing Ltd. (Respondent). (*Withdrawn*).

1716-77-U: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by the Retail Clerks International Union CLC, AFL-CIO (Complainant) v. Kentwood Nursing Home (Respondent). (*Dismissed*).

1718-77-U: Pharmacists and Professional Employees Association, Local 1976, chartered by the Retail Clerks International Union, CLC, AFL-CIO (Complainant) v. Madoc Manor Lodge and Retirement Home (Respondent). (*Dismissed*).

1720-77-U: Sherry Roberson (Complainant) v. Vision '74 Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener). (*Withdrawn*).

1725-77-U: Canadian Union of Public Employees (Complainant) v. Spruce Lodge Nursing Home (Respondent). (*Withdrawn*).

1726-77-U: Office & Professional Employees International Union, Local 343 (Complainant) v. Trenton Federal Credit Union Limited (Respondent). (*Withdrawn*).

1729-77-U: Mr. Horst Knauber (Complainant) v. United Steel Workers of America, Local 6519 (Respondent). (*Withdrawn*).

1734-77-U: Canadian Union of Public Employees, C.L.C. and its Local 1742 (Complainant) v. Birchcliff Nursing Homes Limited, carrying on business as Chatelaine Villa Nursing Home and Job Care (Respondents). (*Withdrawn*).

1744-77-U: Wendy Fitzpatrick (Complainant) v. Vision '74 Nursing Home (Respondent) v. Christian Labour Association of Canada (Intervener). (*Withdrawn*).

1747-77-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Canac Kitchens Limited (Respondent). (*Withdrawn*).

1750-77-U: International Woodworkers of America (Complainant) v. Mount Forest Casket Company Limited (Respondent). (*Withdrawn*).

1791-77-U: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by the Retail Clerks International Union, CLC, AFL-CIO (Complainant) v. Westlake Nursing & Convalescent Home (Respondent). (*Dismissed*).

1792-77-U: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by the Retail Clerks International Union CLC, AFL-CIO (Complainant) v. Kentwood Nursing Home (Respondent). (*Dismissed*).

1802-77-U: Local 604, Hotel & Restaurant Employees & Bartenders International Union, AFL, CIO., CLC. (Complainant) v. Benson Hotel Limited (Respondent). (*Withdrawn*).

1826-77-U: Ontario Nurses' Association (Complainant) v. Rest Haven Private Hospital (Respondent). (*Withdrawn*).

1846-77-U: United Steelworkers of America (Complainant) v. Canadian Racing Plate (Respondent). (*Withdrawn*).

1847-77-U: Dennis H. O'Keefe (Complainant) v. Mr. H. Marentette, President, Marentette Const. Ltd. (Respondent). (*Withdrawn*).

1888-77-U: Albert John Cannon (Complainant) v. Modern Building Cleaning (Division of Dustbane Enterprises Limited) (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55

1385-77-R: Amalgamated Meat Cutters and Butcher Workmen of North America – AFL-CIO-CLC (Applicant) v. Beef Terminal (Respondent).

Unit: "all employees of the Respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during their school vacations, and persons employed less than twenty-four (24) hours per week."

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots		35
Number of ballots marked in favour of applicant	22	
Number of ballots marked against Sterling Packers Employees Association	13	

1618-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Hydro-Electric Commission of Waterloo, Wellesley and Woodwich (ESA-1 Hydro-Electric Commission) (Respondent) v. Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union, Local 1000 (Intervener). (*Granted*).

1619-77-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Hydro-Electric Commission of Kitchener-Wilmot (Respondent) v. Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union, Local 1000 (Intervener). (*Granted*).

1620-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Hydro-Electric Commission of Cambridge and North Dumfries (ESA-3 Hydro-Electric Commission) (Respondent) v. Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union (Intervener). (*Granted*).

1637-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Caledon Hydro-Electric Commission (Respondent) v. Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union Local 1000 (Intervener). (*Granted*).

1752-77-R: Canadian Union of Public Employees Local 5, C.L.C. (Applicant) v. Tricil Limited (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener). (*Withdrawn*).

1763-77-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Rogers Dairy Limited and Rosen Dairy Products Limited (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0742-76-M: Canadian Union of Public Employees and its Local 1358 (Applicant) v. Essex County Roman Catholic Separate School Board (Respondent). (*Terminated*).

1552-77-M: Canadian Chemical Workers Union, Local 21 (Applicant) v. Cyanamid Canada Inc. (Respondent). (*Withdrawn*).

1662-77-M: The Corporation of the City of Belleville (Trade Union) v. The Canadian Union of Public Employees and its Local 907 (Employer). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

1664-77-M: Monarch Optical Inc. (Employer) v. Optical & Plastic Technicians & Allied Workers Union Local 67 of U.H.C. & M.W.I.U. – C.L.C. (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112A

2138-76-M: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents). (*Dismissed*).

0896-77-M: Ontario Provincial District Council on Behalf of Labourers' International Union of North America, Local Unions 491, 493 and 1036, and Labourers' International Union of North America, Local Unions 491, 493 and 1036 (Applicants) v. Construction Labour Relations Association of Ontario on Behalf of the Sault Ste. Marie Builders Exchange and The Sudbury Construction Association and Wilputte Canada Ltd. (Respondents). (*Dismissed*).

1211-77-M: A Council of Trade Unions acting as the representative and agent of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Sewer and Watermain Contractors Association and Bandiera & Associates Toronto Ltd. (Respondents). (*Terminated*).

1484-77-M: Labourers' International Union of North America, Local 1089 (Applicant) v. Bigelow-Liptak of Canada Ltd. Sarnia Construction Association (Respondents). (*Dismissed*).

1667-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. P. A. & N. Construction Ltd. (Respondent). (*Withdrawn*).

1701-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. (1) J.J. Smith Mechanical Limited and (2) The Mechanical Contractors Association of Toronto (Respondents). (*Granted*).

1777-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Mizzi Bros. Construction Ltd. (Respondent). (*Withdrawn*).

1813-77-M: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Bellai Brothers Ltd. (Respondent). (*Withdrawn*).

1814-77-M: United Brotherhood of Carpenters and Joiners of America Local 93 (Applicant) v. Bellai Brothers Ltd. (Respondent). (*Withdrawn*).

1825-77-M: Royal Heating & Air Conditioning Ltd. Toronto Sheet Metal and Air Handling Group (Applicants) v. Sheet Metal Workers International Association Local Union No. 30 (Respondent). (*Withdrawn*).

1844-77-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Herbert Brune Const. Ltd. (Respondent). (*Withdrawn*).

1958-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Hi-Grade Welding and The Mechanical Contractors Association of Toronto (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1251-77-R: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Applicant) v. 358602 ONTARIO LIMITED operating as Innovative Wood Products (Respondent). (*Request Denied*).

1459-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. W. N. Construction (Ottawa) Limited, W. N. Holdings Limited (Respondents). (*Request Denied*).

0992-71-R: The General Contractors' Section of the Toronto Construction Association (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) v. Erectors Division, Ontario Precast Concrete Manufacturers' Association (Intervener #1) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener #2). (*Dismissed*). (*Reconsideration*).

0884-77-R: International Union of Electrical, Radio and Machine Workers – AFL-CIO-CLC (Applicant) v. Lorain Products (Canada) Ltd. (Respondent) v. Group of Employees (Objectors). (*Dismissed*). (*Request Denied*).

1601-77-R: Trizec Equities Ltd. (Security Guards) (Applicant) v. International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. Trizec Equities Ltd. (Intervener). (*Termination*). (*Request Denied*).

1040-77-U: The International Union of Electrical Radio and Machine Workers – AFL, CIO, CLC (Complainant) v. Lorain Products (Canada) Ltd. (Respondent). (*Section 79*). (*Request Denied*).



Ontario

Labour
Relations Board

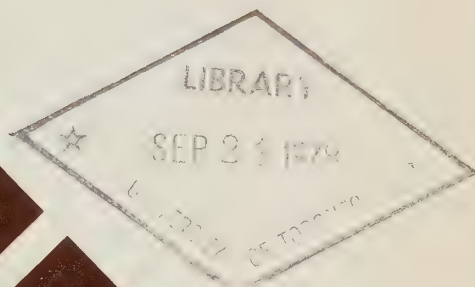
Decisions

May 78

Government
Publication

ON

Q54



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
A. GRIBBEN
A. HERSHKOVITZ
O. HODGES
R.D. JOYCE
F. KEAN
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
W.F. RUTHERFORD
H. SIMON
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYNLEY

Solicitor R.O. MACDOWELL

Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

CASES REPORTED

A.N. Shaw Restoration Ltd., Re Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 AND Peter F. Baggeley	393
Bechtel Canada Ltd., Re Mooretown Insulation Contractors Ltd., et al.	401
Becker Milk Company Ltd., The, Re Milk and Bread Drivers Local Union No. 647	403
Canadian Red Cross Society Blood Transfusion Service, The, Re Canadian Union of Operating Engineers & General Workers AND Canadian Red Cross Blood Transfusion Service Employees Association	408
Craig Bit Company Limited, The, Re United Steelworkers of America	411
Fleck Manufacturing Company, et al, Re International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)	415
J. & M. Chartrand Realty Limited, Re International Union of Operating Engineers, Local 793	423
Journal Publishing Company of Ottawa, Limited, The, Re Raymond Albert Lambert, AND Ottawa Newspaper Guild, Local 205	427
Kaneff Properties Limited, Re Labourers' International Union of North America, Local 183	431
Magna-Cote (Division of Magna International Inc.) Re International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW	433
Malen Steel & Salvage Company Limited, Re Chatham Construction Workers Association, Local No. 53, AND Labourers' International Local 625, AND Teamsters Local 880	435
Norjohn Contracting Limited, Re Canadian Brotherhood of Railway, Transport and General Workers	438
Ontario Paper Company Limited, The, Re Canadian Paperworkers' Union, AND The Canadian Union of Operating Engineers and General Workers	442
Owen Sound General and Marine Hospital, v. Ontario Public Service Employees Union; Canadian Union of Public Employees, Local 48; and Ontario Nurses' Association and its Local 147	445
Paris Poultry Products Limited, Re Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O., C.L.C.	453
Sandra Instant Coffee Company Limited, Re Bakery & Confectionery Workers' International Union of America, Local 264	455
Sherman Sand and Gravel Ltd., Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers	459

II

Thunder Bay Ambulance Services Inc., Re Service Employees Union, Local 268	467
Windsor Arms Hotel Limited, Re Canadian Food and Associated Services Union, AND International Beverage Dispensers' & Bartenders Union Local 280 AND Group of Employees	473

INDEX OF CASES

- Certification – Bargaining Unit – Board refused to allow applicant to carve out smaller unit from incumbent's established province wide unit.
- CANADIAN RED CROSS SOCIETY BLOOD TRANSFUSION SERVICE, THE, Re CANADIAN UNION OF OPERATING ENGINEERS & GENERAL WORKERS, and CANADIAN RED CROSS BLOOD TRANSFUSION SERVICE EMPLOYEES ASSOCIATION 408
- Certification – Bargaining Unit – Collective Agreement – Board issuing interim certificate excluding persons covered by existing agreement – Board interpreting agreement in order to define the scope of certificate
- WINDSOR ARMS HOTEL LIMITED, Re CANADIAN FOOD AND ASSOCIATED SERVICES UNION, and INTERNATIONAL BEVERAGE DISPENSERS' & BARTENDERS UNION LOCAL 280 and GROUP OF EMPLOYEES 473
- Certification – Bargaining Unit – Painters, maintenance staff and cleaning staff all included in a single bargaining unit
- KANEFF PROPERTIES LIMITED, Re LABOURERS' INTERNATIONAL UNION, LOCAL 183 431
- Certification – Bargaining Unit – Where the hours of work of all employees were subject to continuous fluctuation, the Board declined to make a distinction between "full time" and "part time" employees, and granted an all inclusive unit
- PARIS POULTRY PRODUCTS LIMITED, Re AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, A.F.L.-C.I.O., C.L.C. 453
- Certification – Construction Industry – Employees considered members of craft in which they are employed for majority of their time – Board determination not restricted to work done on application date – Repair shop employees considered more appropriate for inclusion in industrial unit and accordingly excluded from construction unit
- J.M. CHARTRAND REALTY LIMITED, Re INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 423
- Certification – Employee – Membership Evidence – Build up – Whether owner operators are dependent contractors – Appropriate time frame for determining employee status – Whether conflict with federal anticomboines legislation – Board applied the usual 30 day rule, found no conflict with the federal legislation and found certain persons dependent contractors
- SHERMAN SAND AND GRAVEL LTD., Re CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS 459
- Certification – Termination – Representation Vote – Whether on application for certification to displace an employee association a vote must be held – No vote required when association has signified that it does not wish to represent the employees

CRAIG BIT COMPANY LIMITED, THE, Re UNITED STEELWORKERS OF AMERICA	411
Consent to Prosecute – Whether by reason of the Legislative Assembly Act a member of the legislature is immune from proceedings before the Board while the legislature is in session – Board held no immunity	
FLECK MANUFACTURING COMPANY, et al, Re INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)	415
Construction Industry – Certification – Timeliness – Collective Agreement – Whether bar to application – Effect of legislation bringing in province wide bargaining – Effect of statutory termination of agreements in the I.C.I. sector – Effect on agreement covering both I.C.I. and other sectors – Board held that agreement terminated only with respect to I.C.I. sector	
MALEN STEEL & SALVAGE COMPANY LIMITED, Re CHATHAM CONSTRUCTION WORKERS ASSOCIATION, LOCAL NO. 53, and LABOURERS' INTERNATIONAL LOCAL 625, and TEAMSTERS LOCAL 880	435
Reconsideration – Procedure – Employer alleging that membership evidence does not reflect wishes of employees because of participation by persons reasonably perceived as managerial – Allegation made at hearing and not previously disclosed – Board declined to entertain allegation – <i>Quaere</i> : Whether employer may complain of undue influence when no employee affected has done so	
MAGNA-COTE (DIVISION OF MAGNA INTERNATIONAL INC.), Re INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW	433
Representation vote – Charges – Effect of alleged breach of silent period – Failure to take reasonable steps to remove propaganda material from bulletin board held to be a breach justifying holding of a new vote	
ONTARIO PAPER COMPANY LIMITED, THE, Re CANADIAN PAPERWORKERS' UNION and THE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS	442
S. 79 – Duty to Bargain in Good Faith – Cumulative effect of disparaging comments about union officials and direct communication and meetings with employees supported finding of bad faith	
A.N. SHAW RESTORATION LTD., Re OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 172 and PETER F. BAGGELEY	393
S. 79 – Duty to bargain in good faith – Failure to transform proposed memorandum of agreement into finalized collective agreement – Parties not ad idem – Bona fide disagreement as to meaning and import of memorandum – No bargaining in bad faith	
SANDRA INSTANT COFFEE COMPANY LIMITED, Re BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 264	455

S. 79 – Strike – Employer terminating employees for misconduct during strike – Whether employees entitled to reinstatement under section 64 – Board held no violation of section 64 – Matter properly one for arbitration BECKER MILK COMPANY LIMITED, THE, Re MILK AND BREAD DRIVERS, LOCAL NO. 647	403
Sale of a business – Bargaining unit – Transfer of undertaking from the Crown to the private sector – Intermingling of employees and need to reconcile pre-existing bargaining rights – Private sector bargaining structure more fragmented than existing all inclusive public sector unit – Board ordered representation votes using private sector units as the basis for the voting constituencies OWEN SOUND GENERAL AND MARINE HOSPITAL, Re ONTARIO PUBLIC SERVICE EMPLOYEES UNION; CUPE LOCAL 48; and ONTARIO NURSES' ASSOCIATION AND ITS LOCAL 147	445
Sale of a business – Predecessor hospitals engaged in the management and operation of an ambulance service – Assets owned by Ministry of Health and right to operate subject to licence – Operation continued by successor with same employees, management organization and use of assets owned by Ministry – Board found transfer and continuation of bargaining rights THUNDER BAY AMBULANCE SERVICES INC., Re SERVICE EMPLOYEES UNION, LOCAL 268	467
Sale of a business – Sale of equipment without transfer of goodwill, customer lists, accounts receivable, or employees held not to be a sale – No continuation of bargaining rights NORJOHN CONTRACTING LIMITED, Re CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS	438
Strike – Reconsideration – Parties – Status of union not party to original section 123 application but arguably bound by broadly drafted Board direction – Board held that persons having notice of the direction and arguably bound thereby have status to intervene and seek reconsideration BECHTEL CANADA LTD. v. MOORETOWN INSULATION CONTRACTORS LTD., et al	401
Termination – Bargaining unit determined with reference to collective agreement scope clause excluding certain temporary employees – Clause found not to exclude strike replacements – Strike replacements found to be employees in the unit eligible to bring application JOURNAL PUBLISHING COMPANY OF OTTAWA, LIMITED, THE Re RAYMOND ALBERT LAMBERT and OTTAWA NEWSPAPER GUILD, LOCAL 205	427

1918-77-U Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172, (Complainant), v. **A.N. Shaw Restoration Ltd.**, and Peter F. Baggeley, (Respondents).

S-79 – Duty to Bargain in Good Faith – Cumulative effect of disparaging comments about union officials and direct communication and meetings with employees supported finding of bad faith

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and F.W. Murray.

APPEARANCES: *L.C. Arnold and J. Petricevic for the complainant; W.G. Phelps, P. Baggeley and P. Ely for the respondents.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER M.J. FENWICK; May 18, 1978

1. This is a complaint filed under section 79 of the *Labour Relations Act* alleging that sections 46, 56, 58, 59, 61, 62 and 70 of the Act have been breached by the respondents. The reference to section 46 in this complaint brings into consideration section 14 of the Act – the section imposing the duty to bargain in good faith.

2. The incidents particularized in the complaint relate to the negotiations now being carried out between the complainant and the employer association of which the respondent company is a member. These incidents raise the question of the extent to which an employer may communicate directly with employees during the course of negotiations. This question, however, can only be answered after an examination of the background to these negotiations, and the particular incidents of communication between the respondent company and its employees.

3. The complainant and the respondent company are parties to a collective agreement running from May 1, 1976 to April 30, 1978. This collective agreement was reached only after a strike had occurred. One provision in the collective agreement is a “no-reprisal” clause providing that “no employee will be subject to any victimization, discrimination, revenge or financial or other penalty of any kind whatsoever at any time by either the Employer or the Union as a result of his working or refusing to work, or crossing or refusing to cross any picket line during this current strike”. The legality of such clause was considered by the Board in an earlier case between these parties, *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504, where it was held that this type of provision was not in contravention of section 56 of the Act. The current agreement was signed by both parties on November 17, 1976.

4. Following the signing of this agreement the complainant faced certain internal difficulties. The business manager at that time, Joe Goodwin, resigned as of the end of December 1976 and was not replaced until the end of August 1977. Joseph Petricevic became the acting business manager at that date, and this appointment was made permanent after elections were held two months later. One of Petricevic's first tasks was to collect outstanding union dues and welfare plan contributions from employers. Petricevic testified that he

collected \$8,000 owing by the respondent company and another \$10,000 owing by other employers.

5. Notice to bargain was given by the complainant to the Steeplejack and Masonry Restoration Contractors Association (the Association) in a letter from Petricevic, dated December 28, 1977. Copies of the letter were also sent to the individual employer members of the Association. The respondent A.N. Shaw Restoration Ltd. is the leading member of the Association, being by far the largest employer of the group. The notice to bargain requested that the first bargaining meeting be held on January 24, 1978.

6. A bargaining meeting was in fact held on that date and the complainant's proposals were presented and explained to the Association. The complainant's set of proposals contained a number of departures from the existing collective agreement. The complainant was proposing that the check-off of union dues by the employer be eliminated and that it collect dues directly from the employees. Although this proposal would be quite unusual outside of the construction industry, it can be understood in the context of the complainant's further proposal concerning the referral of employees by the union. During the existing collective agreement the referral system provided for in the collective agreement was not followed and employers generally hired their employees directly. It is clear that in this set of negotiations the complainant was attempting to establish control over the supply of labour to employers, as in the case with most other construction unions. The complainant, however, was willing to permit an employer to request employees by name up to a maximum of 75%. The response of the Association was to indicate that the complainant's proposals were not acceptable.

7. Also discussed at the meeting was the question of an additional 10 cents per hour employer contribution to the welfare plan under the existing collective agreement. Apparently, the complainant's former business agent, Goodwin, had indicated to the membership that the employers had agreed to pick this amount up as part of the settlement. The collective agreement, however, made no mention of the additional 10 cents. At the meeting on January 24th it was made clear by the employers that they had no obligation to pay the additional amount, and that they regarded certain statements by Petricevic concerning this matter to be defamatory. After some two hours of discussion, Petricevic conceded that the employers had no obligation under the collective agreement to pay the additional amount and agreed to explain this fact to the members. Petricevic testified that he did indicate at a later meeting of the membership that the employers were not bound under the collective agreement to pay the additional amount for welfare.

8. Shortly after the first negotiating meeting, on February 6, 1978, the respondent company sent out a letter addressed to "All A.N. Shaw Employees". The text of this letter, which was signed by the respondent Baggaley, is set out below:

"As you are probably aware, the Masonry Restoration Contractors and your representatives of Local 172 have started negotiations for a new contract. I shall be writing to you regularly to keep you informed on what progress has been made and to enable you to be aware of what demands are being made and what offers have been put forward.

You should know that the employers have been presented with de-

mands which are both damaging to the companies and to you. You should read the enclosed copy which is one of the demands by your union – Article 4 – “Union Security”. You will see that the company *cannot phone you* to come to work but must first phone the union. If, because you have not kept up union payments and you are behind, the union says you will not be able to work until your dues are paid up. The union says that we may also only ask for 75% of our employees by name. This means that the union could stop you working for A.N. Shaw.

The company wants you to be able to work in order to be able to pay your bills. You should not have to go to the union and *hope* that they will send you to A.N. Shaw.

A.N. Shaw believes that the present system has worked very well and that we should be able to call you direct to come to work and give you a job whenever we can. A.N. Shaw *will not agree* to unusual demands like this, which stops us calling you at home to give you a job.

You should know, that unfortunately, based on the damaging and unreasonable demands your union has made, the companies see a very difficult time ahead.

The company must remain competitive and strong, in order to get contracts and provide jobs. The company cannot do this with the demands at present being made by your union.

There must be a big change in the union’s demands, otherwise we can see no alternative than a strike, which the company is already preparing for.

We all remember the strike which we endured before the present agreement, with some unhappiness at the wages lost.

We will make every effort to reach a fair and sensible agreement because nobody gains from a strike.

You should attend your union meetings and *make sure your feelings are known*.

Please feel free to talk to me, Tony or Andy – or anyone at any time about the demands that are being made and the company’s attitude towards them.

You received a letter from your union business manager dated December 5th, 1977, which, among other things indicated that “the contractors were going to pick up the 10¢ per hour for welfare with no questions”.

MR. PETRECEVIC HAS ADMITTED THAT THIS STATEMENT IS *NOT TRUE* AND HAS PROMISED TO CONFIRM TO ALL MEMBERS OF LOCAL 172, THIS FACT.

During these last few weeks, although the weather has been very bad, we have had a lot of inquiries from building owners for repairs and already we have some work to start on in the spring. Our salesmen are busy calling on old customers and trying to get new customers, so hopefully we will have another successful year at A.N. Shaw."

9. On February 13, 1978, the respondent Baggaley, who was the president of the respondent company and also the president of the Association, wrote to Petricevic indicating that the employers regarded the complainant's proposals as unrealistic and unacceptable. Accompanying this letter was the Association's proposals. These proposals contained a union security clause differing from the one contained in the expiring collective agreement in that it provided more latitude for employers to hire directly. The proposals also provided for a wage increase of 40 cents per hour in the first year and 40 cents per hour in the second year.

10. The next communication was a newsletter, dated February 20, 1978, from Petricevic to the complainant's membership. The two paragraphs in that newsletter which refer to the negotiations are set out below:

"...

As suggested by numerous members that work for A.N. Shaw, that I put in this letter, so that all know of the B.S. which Mr. Peter Baggaley put in the letter sent to every employee of Shaw. I had a few members send me the letter they received, some telephoned me and some came to the office quite upset. Now, I would assume that some of the other Employers have a little more respect for their employees than he, and don't share his views, however, he is the President & Secretary of the Association we are dealing with.

The men with whom I spoke considered it an insult to their intelligence with such garbage being circulated to their homes in an effort to degrade their mentality and intimidated them and be called employees when 80% are laid off; and putting in statements like "there must be a big change in the Union demands, otherwise we see no alternative than a Strike, which the company is already preparing for." Who the hell does he think the Union is but each and every man in Local 172, united. And they are suppose to be bargaining in good faith. To top it all off, he was so sure, honest and proud of his letter that he didn't even sign it. What can I say? He is finally getting the message that the members of Local 172 are finally tired of getting cheated out of Welfare, Check-Off, whether it be due to sending it in late, holding it back, or, as they put it "misunderstanding of the Agreement". I don't have to tell any of you how many times that's happened. In the new Agreement we clarified it so there can be no "misunderstanding", and that it is the

Union Members on the jobs first, who are now at home, laid off, waiting to get called back and somebody of the streets as in the past, and they are complaining. I don't think I need to tell you why. They think they can give you a snow-job and that you don't know what's going on.
...

12. On the following day, February 21st, Baggaley wrote to Shaw employees inviting them to a meeting to be held on March 3, 1978 to discuss "prospects for work this year, safety, and union negotiations". The invitation indicated that those persons attending the meeting would be paid for their time. At the next negotiating session, March 1st, Petricevic raised the matter of the meeting of employees called by the respondents and objected to it. When he inquired as to whether he would be permitted to attend, he was told that he would not be welcome. No further progress in the negotiations was made that day.

13. Approximately ninety persons attended the meeting held on March 3rd. According to Harold Kinsley, the complainant's president and an employee of the respondent company, this was the first time that union negotiations had been discussed at this type of meeting. Kinsley testified that instructions on the use of a safety belt took up the first ten minutes of the meeting and the remainder of the two-hour meeting was devoted to a discussion of the negotiations. Peter Ely, a member of management, set out the history of the company, referring to past harmonious relations with the union, and to the difficulties of competing with non-union employers. Favourable reference was made to the efforts of Joe Goodwin, the former business agent, and mention was then made of the different situation that now existed. Ely also referred to the no-reprisal clause, indicating that employees who either crossed picket lines or refused to cross picket lines would be protected in future disputes. Ely stated that the company would continue to work during the strike, even if it was necessary to hire persons who were not members of the union. Ely further stated that the company did not want outside interference with the employment relationship, that it was opposed to the referral system being proposed by the complainant, that dues check-off by the company would enable it to assist the employees who fell behind in dues because of winter lay-off, and that the company wanted absolute control over hiring.

14. The next management spokesman was Dan Owen. He opened his remarks by referring to the present economic situation, indicating that no wage increase might be justified in these economic circumstances. Owen went on to mention the company's wage offer to the complainant, indicating that it was ample and final. Owen stated that it was a painful problem for the company to have to negotiate every two years, and that it would continue to operate regardless of whether a collective agreement was signed. Finally, he told the employees that they should attend their union's meetings to make their voices heard by their negotiating committee. In reply to a question from the floor, Owen indicated that the new wage rate would be paid if a strike occurred.

15. After this meeting further negotiating sessions were held on March 28th and April 20th but no progress was made. The complainant has now applied for arbitration services.

16. The complaint, in our view, is in essence a complaint relating to the respondents' bargaining conduct. Our starting point, therefore, must be section 14 of the Act, containing the statutory direction to bargain in good faith and make every reasonable effort to make a collective agreement. This section, though, cannot be read in isolation from the other provi-

sions in the Act intended to protect and encourage the collective bargaining process. It is quite possible for a failure to bargain in good faith to show facets of illegality involving breaches of sections of the Act other than section 14. Thus, although a breach of one of these other sections of the Act is neither a necessary nor even a sufficient condition for a finding that there has been a failure to comply with the statutory direction in section 14, such a breach may be a persuasive indicator of a failure to bargain in good faith.

17. To what extent can an employer communicate with its employees during the negotiating process? The scheme of the Act contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in its bargaining unit. The exclusivity of the unions bargaining rights is expressly protected by section 59, which reads:

59. – (1) No employer, employers' organization or person acting on behalf of an employer or an employer's organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

This section prohibits employers from bargaining directly with employees represented by a bargaining agent, and rival unions from bargaining on behalf of such employees.

18. The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be

characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

19. The question in this case is whether the respondent company's communications to its employees can be characterized as an attempt to bargain directly with them. The first communication was the letter of February 6th, coming just over two weeks from the first bargaining session. This letter cannot be characterized as an attempt by the employer to explain its bargaining position, nor as an attempt by the employer to set the record straight by clearing up a perceived misunderstanding on the part of the employees. Rather, the respondent company took upon itself to disparage the union's proposal in no uncertain terms. Even more significant, at the very outset of the negotiations before any real discussions had taken place with the union, the company had indicated to the employees that it would take a rigid position on the referral system, while at the same time raising in the minds of the employees the uncomfortable spectre of a strike. The nature and timing of these remarks raises a serious question of whether the employer was indeed attempting to bargain directly with the employees.

20. The letter of February 6th, however, does not stand alone. The meeting of March 3rd provides further evidence of the respondents' motives. Statements made at that meeting by members of management amounted to a subtle disparagement of the union's bargaining committee. Again the respondents criticized the complainant's proposals and raised the possibility of a strike. The respondents, moreover, stated its monetary offer to the employees, indicating that it was ample and final. The emphasis upon the finality of the offer, coming at such an early stage of the negotiations, is an indication that the company was attempting to direct its bargaining efforts at the employees rather than their bargaining agent.

21. Counsel for the respondents argued that the meeting was merely an attempt by the company to set the record straight by dispelling an atmosphere of mistrust created by the complainant. The facts do not support this argument. The statements made at the meeting went well beyond any attempt to clear up any perceived misapprehensions. Moreover, we are not at all convinced that the actions of the complainant's business agent were designed to create an atmosphere of mistrust, being no more than an attempt to provide more vigorous representation for the employees.

22. The fact is that at this very early stage of the negotiations the respondents had chosen to discuss the issues in dispute more fully with the employees than with their bargaining agent. In these circumstances, we find that the respondents were attempting to bargain directly with the employees in violation of section 59 of the Act. We find also that such conduct served to undermine the viability of the complainant as exclusive bargaining agent in violation of section 14 of the Act. Having found a violation of both section 59 and section 14, we do not consider it necessary to determine whether there has been a breach of the other sections of the Act as alleged in the complaint.

23. The Board, therefore, directs the respondents to refrain from any further attempts to bargain directly with the employees during the course of the present negotiations.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. I would not have found that the respondents had violated section 59 and section 14 of the Act.

3. I do agree with the first observation made in the decision in paragraph 16, in which the complaint is in essence relating to the respondents' bargaining conduct and specifically with respect to the letters directed to the employees by the respondent, and the respondent's meeting on March 3rd. I am of the opinion that these could have been characterized as an attempt by the respondent to advise its employees as to the progress of parties positions in the collective bargaining process. Indeed the witness Kinsley testified that the meeting on March 3rd was a "reporting meeting". This is not to say that he agreed with the fact that the employer was conducting such a meeting, but it is, in my opinion, quite clear from remarks made at the meeting and reported by Mr. Kinsley himself, the employer was not making any offer to the employees or attempting to bargain with the employees, which would have been a breach of section 59 of the Act.

4. While it is true from a timing standpoint the employer did advance to the employees the company's position early in the collective bargaining process, it is clear from the evidence in my opinion that the company, having experienced what was at least in their opinion an unnecessary strike in the settlement of their last collective agreement, took these steps in an attempt to head off a strike on this occasion.

5. One of the most contentious points in the dispute was that concerning the company's past practice of rehiring its regular employees following the winter lay-off without going through any referral system. The company's earlier communication in December in which the company outlined that it intended to take a rigid position with respect to the union's proposal regarding the referral system which would in effect require the company to hire many employees through the union hiring hall rather than calling back those employees who had been laid off, does not in my opinion constitute taking an uncompromising position in collective bargaining or in effect a failure to bargain in good faith. If the company sincerely believed that such a system would hamper its ability to employ competent employees, and if such a system would affect the call-back rights that many employees expected they would have when they were laid off in the fall, it seems to me the company would be obligated in such circumstances to announce its beliefs and its opposition to this change at the earliest possible point in time.

6. The evidence also indicated that the new business manager, Mr. Petricevic, had claimed that the company was supposedly to advance the employees a further 10 cents per hour for some form of welfare benefits because he claimed that the former business manager said that the company had promised this adjustment verbally. While Mr. Petricevic agreed that he could find no documentary evidence of this undertaking, he also agreed that the company vigorously denied that there was any such undertaking. It was also clear that this witness did not accept this denial and instead believed the statement made by the former business manager and he accordingly reported this in his letter to the membership under date of February 20th, and at this point in time it is quite clear that there was a great deal of mistrust in the minds of both sides towards each other.

7. From all of the evidence in this case I would not have found that the company's attempts to avoid a repetition of what the company believed to be an unnecessary strike to be a violation of section 59 and section 14 of the Act.

0675-77-U Bechtel Canada Ltd., (Applicant), v. Mooretown Insulation Contractors Ltd., Eaman-Riggs Limited, K.J. Armstrong, George Anderson Jr., James E. Cable, Leonard Caul, Vincent R. Caul, Christopher D. Clarke, Cecil Vanderveen, Harvey L. Williams, John Ainsworth, Keith Ainsworth, Peter Ainsworth, Steven Ainsworth, Eugene Bowman, Angus Burnett, Eugene Cassibo, Aubin Chiasson, Gerald Chipman, Dave Clements, John Cutler, Leslie Cutler, Gerry Dagenais, John Edgar, Rick Foster, Joseph Giardino, Robert Gilchrist, Edward Hamilton, Mark Heartwell, Robert Hughes, Duncan Jaffray, John Keller, Joseph Lesko, Ian Lightfoot, Howard Mallette, Joseph Matthews, Joseph Miller, Orval Mindle, Steve McCartney, Mike McGhee, Ken MacLeod, Robert MacLeod, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, Helier Richard, Marc Richard, Robert Shepherd, Jim Sizer, John Sizer, Frank Smith, Winston Smith, Ronald Thompson, Greg Twinn, William Valiquette, Dennis Van Der Veeken, William Van Hoof, and George Yetman, (Respondents).

Strike – Reconsideration – Parties – Status of union not party to original section 123 application but arguably bound by broadly drafted Board direction – Board held that persons having notice of the direction and arguably bound thereby have status to intervene and seek reconsideration

BEFORE: R. A. Furness, Vice-Chairman

APPEARANCES: *D. I. Wakely, F. J. Gaspar and L. G. Gauvin appearing for the applicant; R. A. Werry appearing for Mooretown Insulation Contractors Ltd. and Eaman-Riggs Limited; no one appearing for the remaining respondents; and L. C. Arnold and H. Douglas appearing for Local Union 663, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, commissioned by the Sarnia Building Trades Council.*

DECISION OF THE BOARD: May 11, 1978

1. The applicant made an application for relief under section 123 of The Labour Relations Act. In a decision dated July 26, 1977, the Board issued a direction with respect to the conduct of the respondents (other than the corporate respondents. This application was one of a series of applications for relief under section 123 by various employers which were engaged in construction projects in and around Moore Township in the County of Lambton. Upon the issuance of the direction in this application the various similar applications were adjourned *sine die*. See Board File numbers 0684-77-U, 0692-77-U and 0693-77-U.

2. Having regard to the evidence before it, the Board held that the respondents (other than the corporate respondents) had engaged in an unlawful strike. It was established before the Board that the unlawful strike involved a complete stoppage of work by several thousands of employees over a wide area of the County of Lambton and affected more than two billion dollars worth of construction projects. The Board issued a direction which was expressed in very broad terms and which, in part, directed the respondents (other than the

corporate respondents) together with "... their representatives, agents, substitutes or any person having notice of this direction ..." to refrain from doing certain things.

3. Local Union 663, United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of the United States and Canada ("Local 663") has requested the Board to reconsider its decision in this matter pursuant to section 95(1) in so far as it purports to bind persons and trade unions which were not parties at the initial hearing.

4. The Registrar listed this matter for hearing and the Board proceeded to entertain argument on whether Local 663 had the status to request the Board to reconsider its earlier decision.

5. The applicant and the corporate respondents argued that Local 663 did not have status to request the Board to reconsider its decision. Local 663 was characterized as a stranger to this proceeding which could not have established its right to be present at the initial hearing. Two previous decisions of the Board were relied upon in support of these propositions, the *Formrite Forming Ltd.* case, [1971] OLRB Rep. February, p. 49 and the *Napev Construction Limited and Vepan Leaseholds Limited* case [1976] OLRB Rep. March, p. 109.

6. Local 663 argued that its status to request reconsideration of the Board's decision depended on whether any of its legal rights had been affected and that because its legal rights were affected it was entitled to notice of the initial hearing.

7. The two decisions referred to in paragraph five are based upon a failure of a council of trade unions or a trade union to establish that it had an interest in proceedings with respect to representation. In the *Formrite Forming Ltd.* case, *supra*, the Board held that a council of trade unions remained a stranger to a proceeding with respect to certification where such proceeding had previously been completed. The Board also held that the filing of evidence of membership subsequent to the granting of a certificate did not establish that the council of trade unions had an interest so as to enable it to request leave to intervene in a proceeding which had been completed. In the *Napev Construction Limited and Vepan Leaseholds Limited* case, *supra*, the Board held that a trade union lacked status as a party having an interest within the meaning of The Labour Relations Act requiring it to have notice of and participation in a proceeding with respect to section 1(4). The bargaining rights of that trade union were not affected by any determination which the Board might make and any interest of that trade union would be merely of a commercial nature. In the instant proceeding, however, a question of representation does not directly arise. The issues before the Board in the instant proceeding relate to the exercise of discretion by the Board pursuant to section 123 and to the power of the Board to purport to bind persons who are not parties to a proceeding. There is no doubt that Local 663 is affected by the very broad terms of the direction. The rights of Local 663 are affected by the direction and in the circumstances the Board finds that it has status to request the Board to reconsider its decision.

8. The request for reconsideration raises the question of the appropriateness of the inclusion of the words "... any persons having notice of this direction". The Board in proceedings under section 82 and section 123 has included such words in directions. See, for example, the *Pilkington Brothers (Canada) Limited* case [1976] OLRB Rep. January, p. 988, and the *Pigott Construction Limited* case, [1976] OLRB Rep. April, p. 160. Similarly, in

Hallnor Mines Limited v. Behie et al. [1953] O.W.N. 868,872, the High Court in a labour relations dispute gave an injunction in wider terms when it substituted the proposed words "their representatives" with "all those acting with knowledge of this order". The request for reconsideration also raises the question of the distinction which has been made regarding the conduct of non-parties to a proceeding with respect to contravening an order as opposed to knowingly acting in contravention of it. In this regard see *Re Tilco Plastics Ltd. v. Skurjat et. al.* [1966] 2 O.R. 547 and *Catkey Construction Ltd. v. Moran* [1970] 1 O.R. 355. More recently the Manitoba Court of Appeal has canvassed the question of the propriety of holding a person bound by an injunction where such person is not a party to a proceeding. See *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers et al.* (1978) 80 D.L.R. (3d) p. 634 and the cases cited therein. The issue which has been raised in this paragraph together with the question of the effective term of a direction of this Board raise interesting points on which the Board is prepared to entertain submissions.

9. The Registrar is directed to list this matter for hearing for the purpose of entertaining representations with respect to its decision in this matter dated July 26, 1977.

File No. 1048-77-U; 1049-77-U Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant), v. **The Becker Milk Company Limited**, (Respondent.)

S-79-Strike – Employer terminating employees for misconduct during strike – Whether employees entitled to reinstatement under section 64 – Board held no violation of section 64 – Matter properly one for arbitration

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Harold F. Caley for the complainant; L. Sanderson for the respondents.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; May 17, 1978

1. In these two applications under section 79 of the Act the Board, by its decision dated December 21, 1977, determined that on September 22, 1977 the respondents had unlawfully refused to reinstate the grievors in their employment, contrary to section 64 of The Labour Relations Act. The Board remained seized of this matter, at the request of the parties, to deal separately with the remedy should the parties be unable to reach any agreement. The complainant, by letter from its counsel dated March 17, 1978, advised the Board that the parties had not reached an agreement and requested a further hearing for a determination in respect of the remedy.

2. At the hearing convened for that purpose the following undisputed facts emerged:

1. On September 22, 1977 the grievors were unlawfully denied their right to reinstatement in their employment under section 64 of The Labour Relations Act.
2. On September 27, 1977 the respondents advised the grievors, in writing, that they were discharged. It is common ground in these proceedings that the sole reason for the refusal of reinstatement to work and for the later dismissal was that each of the grievors was criminally charged in relation to his actions on the picket line.
3. On October 20, 1977, the Board heard the complaint relating to the September 22, 1977 refusal to put the employees back to work. At that hearing the respondents conceded that the grievors had not been discharged on the day that they were denied their right to return to their jobs. At that hearing neither party advised the Board of the subsequent discharges which occurred on September 27, 1977. That part of the respondents' conduct was not made an issue in those proceedings.
4. The union filed grievances against the discharge of all of the employees under the collective agreement which had been executed between itself and the employers on September 22, 1977. It is agreed that the discharges which occurred on September 27, 1977 are covered by the new collective agreement and that the grievances in relation to them properly come under the arbitration provisions of that agreement. The grievances dated October 14 and October 17, 1977, had all been received by the employers by November 24, 1977.
5. By letters dated December 2, 1977 counsel for the union confirmed its agreement that those grievances and the constituting of a single arbitrator to hear them should be held in abeyance pending the outcome of the instant complaint before this Board.
6. On December 21, 1977 the Board issued its decision. That decision was, in accordance with the request of both parties, in the nature of a declaration that the grievors had been unlawfully refused the opportunity to return to work under section 64 of The Labour Relations Act on September 22, 1977.

3. It is submitted on behalf of Becker's and Ind-Ex that their liability in relation to the established breach of the Act extends only to the time between September 22, 1977 when the breach of the Act occurred, and September 27, 1977, when according to the employers, the grievors were discharged for just cause under the collective agreement. Counsel for the employers submits that reinstatement and compensation in relation to the Board's decision must, therefore, be limited from September 22, 1977 to and including September

27, 1977. He argues that by virtue of the Board's decision the grievors were employees entitled to be working at that time, but that on the day of their discharge they were employees with no greater right than other employees. That is, they were employees discharged during the currency of a collective agreement who have filed grievances under that agreement and are entitled to a final and binding adjudication of those grievances under the arbitration mechanism in their collective agreement. He submits that the Board should not, in the circumstances of this case, exercise its remedial discretion under section 79 of the Act to, in effect, seize jurisdiction of an arbitration of whether the employers had just cause to dismiss the grievors within the terms of the collective agreement. The employers submit that that is an issue for a sole arbitrator to determine in the due course of the ongoing grievances.

4. It should be noted that counsel for the employers undertook on behalf of his clients that no formal or procedural objection as to arbitrability, timeliness or otherwise in respect of the jurisdiction of the arbitrator would be taken, and that there is no legal impediment to the grievances being heard and disposed of on their merits.

5. Counsel for the union makes two submissions in opposition to that argument. Firstly, he argues that the Board should order permanent reinstatement of the grievors with full compensation to the time of their reinstatement. This he says the Board should do by way of vindicating the rights of the grievors under section 64 of The Labour Relations Act. To do this he submits that the Board should, by its order, amend the collective agreement. Alternatively, he argues that if the Board does not fully amend the collective agreement to take the matter entirely out of arbitration, that it should partially amend the agreement in order to itself hear and dispose of the grievances under the just cause provisions of the collective agreement.

6. In its decision given orally at the hearing the Board, assuming that it had the jurisdiction to do what the union requested, declined to amend the collective agreement or seize jurisdiction of the arbitration of the grievances. This decision is provided by way of written reasons for that ruling.

7. The Board cannot accept the argument made on behalf of the grievors that their right to reinstatement under section 64 of The Labour Relations Act in some way overrides their normal liability to discipline for just cause by their employer. Reinstatement under section 64 of The Labour Relations Act does not confer on an employee any greater privileges or rights than those enjoyed by other employees. Put differently, the duty which an employer has to reinstate employees who make unconditional applications to return to work under section 64 of the Act does not take away such freedom as the employer otherwise has to lawfully discipline those employees.

8. In a complaint under section 79 of The Labour Relations Act the first issue is whether there has been a breach of the Act. It was not submitted by counsel for the union that the discharges on September 27, 1977 were themselves breaches of The Labour Relations Act. Rather, it was agreed that the reason for discharge was the same as the original reason for refusing to reinstate, namely that each of the employees in question had been criminally charged. In other words there was no breach of the Act alleged to have occurred by means of the discharges. The only issue outstanding is whether the employers had just cause to discharge the grievors when they did. That is a question for arbitration under the collective agreement.

9. The Board therefore orders the reinstatement, with compensation, of each of the grievors for the period from September 22, 1977 to September 27, 1977, inclusive. Any rights which the grievors have from and after their discharge on September 27, 1977 is properly to be dealt with in arbitration proceedings.

DECISION OF BOARD MEMBER O. HODGES:

1. I have had the opportunity of reading the reasons of the majority and cannot agree with the result that they have reached. The decision places a serious and unnecessary burden on employees in this case and serves only to ratify a situation which is manifestly unjust.

2. From June until September of 1977, the respondent's employees were engaged in a long, difficult, and legal strike. On September 22, 1977, the employees, as was their right, sought reinstatement to their former employment pursuant to section 64 of the Labour Relations Act. When the employer refused to reinstate some thirty of their number, application was made to this Board for relief. The Board eventually found that the employer's refusal was illegal, and ordered reinstatement. The employer has persisted in his refusal to reinstate the employees, and has now brought before us certain facts which were not raised at the earlier hearing.

3. As has already been indicated the employees sought to exercise their statutory right to reinstatement on September 22, 1977. At that time the employer refused to reinstate some thirty of them. On September 27, 1977 – that is after it was evident that the employees were seeking to exercise their section 64 rights, but before any application to this Board – the employer purported to “discharge” the thirty employees which it had previously refused to reinstate. The fact that this “discharge” followed shortly after the employees' assertion of their statutory rights is significant in itself, but even more unusual are the alleged grounds for this mass discharge.

4. During the strike, a number of the employees were engaged in conduct which gave rise to charges under the Criminal Code or the Highway Traffic Act. Some of the charges were subsequently dropped, while others proceeded to trial with the result that some of the employees were acquitted. Nevertheless all of the employees who had been charged were discharged, even though the charges had been dropped against some and others had been found not guilty. We thus have the following suspicious scenario: A group of employees seeking their statutory right to reinstatement, a refusal to reinstate some of them, the prospect of a proceeding before the Labour Relations Board to enforce reinstatement, and a mass discharge of these same employees in circumstances where there appears to be no just cause – at least in respect of some of them. [For the arbitral jurisprudence on the propriety of discharge in such cases see: *Palmer Collective Agreement Arbitration in Canada* pp. 303-311, and *Brown & Beatty Canadian Labour Arbitration* pp. 320-323 and the cases cited therein.] In addition we have the employer asserting before us that the Board should not enquire into the merits of the discharges because that is a matter for arbitration under the collective agreement. The matter of “just cause”, says the employer is a separate and distinct issue from the right to reinstatement under section 64, and this Board should defer to arbitration.

5. In my view it is mere sophistry to assert that the refusal to reinstate on September

22, is unconnected with the purported discharges (and consequent continued refusal to reinstate) *the same employees* on September 27 – particularly where, as here, a number of the discharges appear *ex facie* to be unjust. The issues cannot be divided into the neat mutually exclusive categories which the employer proposes. It is apparent to me that we are dealing with a single transaction, and it is difficult to resist the suspicion that this pattern of events was carefully orchestrated in order to achieve the employer's objective.

6. The employer asserts that arbitration is the complete answer to the employees' complaint. If the employees have been improperly discharged they can seek redress at arbitration. I would have more sympathy for this position if I were assured that *this collective agreement* permitted an arbitrator to determine whether the discharges were warranted but, in any event, this position would make nonsense of the section 64 guarantees. In order to avoid section 64 an employer would merely have to assert that he was discharging employees "for cause" and these discharges could be as inconsistent, and unfair as the ones in this case appear to be. Indeed, as in this case, an employee might find that he had been discharged because of some alleged misconduct *prior* to his request for reinstatement, or some minor peccadillo which could not possibly be just cause for discharge. Since in most cases section 64 will only apply in lost strike situations where there is no collective agreement, and thus no recourse to arbitration, an employee would be left without a remedy and his section 64 rights would be entirely illusory. Indeed that may well be the situation in this case since it is by no means clear, having regard to the language of this collective agreement, that an arbitrator can determine whether there was just cause for discharge.

7. I accept the submission of counsel for the employer that we have no jurisdiction to arbitrate disputes concerning the interpretation of the collective agreement; but it seems to me that we cannot avoid an enquiry into whether there was just cause to refuse to reinstate an employee. If a series of discharges follows immediately upon a request for reinstatement, confirms a previously disclosed opposition to reinstatement, and appears manifestly unfair (for example in this case by treating employees who are convicted in the same way as those who were acquitted or against whom charges were dropped), there is in my view a strong suggestion that the employer was not simply exercising his managerial prerogative, but was attempting to undermine the employees' section 64 rights.

8. I have an additional concern. This case highlights yet again, the serious defects in the so-called "private" arbitration process to which the parties are compelled to resort. This process, which was originally intended to provide an expeditious, informal, and relatively inexpensive remedy for collective agreement disputes, is simply incapable of dealing with mass discharges or other blanket actions by the employer – even when the conduct constitutes a clear breach of collective agreement obligations. This problem was raised in *Milrod Industries* [1977] OLRB Rep. (Feb.) 79 and it is raised again here.

9. In this case the Board is deferring to the arbitration process even though there is some doubt from the language of this collective agreement that an arbitrator will be able to determine whether discharges are warranted in the circumstances, but apart altogether from this problem there are very real procedural difficulties faced by these employees. If the Board does not order a consolidated arbitration proceeding under section 37(3) of the Act, and if the employer is unwilling to agree to such procedure, the employees may be facing as many as thirty different arbitration hearings. As a result, the propriety of these discharges will take months and perhaps years to resolve, and that resolution will cost thousands of

dollars. This is an outrageous result, and one which in my view is totally unnecessary. In the absence of a collective agreement (i.e., the normal section 64 situation), I submit that the Board would carefully scrutinize an employer's mass discharge or mass refusal to reinstate, and would be inclined to find that in the absence of just cause, the employer was simply seeking to avoid his section 64 obligation. In my view the presence of a collective agreement – particularly this collective agreement – should not be a bar to a similar inquiry. While this Board has no authority to adjudicate collective agreement disputes, it does have the responsibility to ensure that employees' statutory rights are protected and they are not discriminated against or discharged because they were exercising rights under the Act.

10. In the result therefore I would inquire into the propriety of the employees' discharges. In the absence of a just and reasonable cause for the discharges, I would conclude that this conduct constitutes a refusal by the employer to accord employees their section 64 rights.

1646-77-R Canadian Union of Operating Engineers & General Workers, (Applicant), v. **The Canadian Red Cross Society Blood Transfusion Service**, (Respondent), v. Canadian Red Cross Blood Transfusion Service Employees Association, (Intervener).

Certification – Bargaining Unit – Board refused to allow applicant to carve out smaller unit from incumbent's established province wide unit

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Larry Haiven and Ron Chyczij for the applicant; Hector B. Martinez, Peter Friesz, Michael Arbogast and Steve Vick for the respondent; H. James Marin and N. Brown for the intervener.*

DECISION OF THE BOARD: May 12, 1978

1. This matter arises out of an application for certification and a pre-hearing representation vote.

2. The unit applied for by the applicant is a unit of non-professional clinical, laboratory and transport employees at the respondent's depot in Toronto. The intervener presently holds a certificate from the Board for a single unit of the same categories of employees in all four of the respondent's Ontario depots: London, Hamilton, Toronto and Ottawa. The intervener and respondent are parties also to a collective agreement for the term November 22, 1976 to December 31, 1977. The Board, following its long and well-established practice designated the appropriate voting constituency to be the bargaining unit defined in that collective agreement. In view of the applicant seeking to carve out part of that unit, the Board put it on for hearing for the applicant to show cause as to why the Board should vary from its customary practice.

3. The Board finds it useful to consider this application against two other prior events. In the latter part of 1975, Canadian Union of Public Employees applied to be certified on behalf of a similar group of employees at Toronto and lost a representation vote (see the Board's decision issued January 15, 1976, file no. 1378-75-R). By decision dated April 21, 1976, the Board certified the intervener in this application without a representation vote for the present four depot bargaining unit (see Board file no. 0013-76-R).

4. The applicant union is not a stranger to the Board's procedures in respect to the carving out from existing units, both craft and non-craft groups of employees. See *The Hydro-Electric Power Commission of Ontario* case, [1969] OLRB Rep. May 169 for an instance where it was successful. In that case, the Board found some compelling reasons why the carve out should be allowed (see paragraphs numbers 3 to 6 inclusive), not the least of which the Canadian Union of Operating Engineers already represented the employees in two other operational units of Hydro employees doing the same type of work and which were already a deviation from the "province-wide" unit from which it was seeking to carve off a third such unit.

5. In the case at hand, however, the applicant relied very largely on arguments and allegations, often not supported by either evidence or by the Board's records. The principal reasons offered to the Board are set out below.

6. It gave as one of its primary reasons as to why the Board should allow its application the fact that employees in the Toronto depot saw themselves being trapped by the regional unit, unable to influence their collective bargaining destiny and deprived of the right to self-organization. The facts set out in paragraph 3 above regarding the Canadian Union of Public Employees' application, plus the information offered by the applicant's representative at the hearing that it was the Toronto depot employees who spearheaded the successful application of the intervener in 1976, hardly does credit to this reason.

7. Another argument offered is that the present unit was found to be appropriate by agreement of the parties and thus the Toronto employees were swept into the unit. Therefore, the Board should be prepared to allow these employees a renewed opportunity to exercise their choice of a bargaining agent. The facts in the situation show quite the contrary. At the time of the application there were a total of 192 employees within the scope of the bargaining unit in all four depots, with 101 of them in Toronto. The Association was certified with membership support in excess of eighty per cent and even if the Association enjoyed one hundred per cent support from the three other depots, it still left sixty-five per cent of the Toronto employees in support of its application. The record also shows the application was for a unit of the Hamilton, Toronto and Ottawa depots and the employer's reply sought to have London added to avoid it being left as a splinter from its whole Ontario operation. The Board, by means of its normal procedures, would have posted notice of the application in the three depots and there was no evidence of opposition to the regional type of unit proposed. Furthermore, the Board in carrying out its statutory responsibility under section 6(1) of The Labour Relations Act, would not have enlarged a regional unit by the addition of the London depot unless it had already found the three-depot regional unit to be appropriate in other respects. Since these circumstances may give the appearance that the London depot employees were "swept in" to the regional unit (rather than the Toronto employees as implied by the applicant), it is important for the Board to make two observations. Firstly, while the Board proceeds with the utmost caution in certifying a regional unit in order to

avoid the possibility of interfering with the right of self-organization and to assure a reasonable prospect of a viable collective bargaining relationship being established, it also recognizes that similar risks may be posed by an industrial unit in a single plant or in a multi-location unit within a single municipality and that there is always the risk of employees opposed to the applicant being swept into the unit. See the *Adams Furniture Co. Limited* case, [1975] OLRB Rep. June 491, paragraph 7 and 8 at pp. 492-3. Secondly, it is for the Board to determine appropriateness and it need not be determined by consent or agreement of the parties; or to put it another way, even if the parties have agreed on an appropriate unit, it is still for the Board to decide the matter.

8. The applicant claims that the Toronto employees have been inadequately represented by the intervener, but there was no evidence called to support this claim; therefore, the Board discounts it.

9. The applicant argues further that the Board need not be concerned about fragmentation in allowing a carve out, since the Board has twice deemed the Toronto depot to be a geographical unit appropriate for collective bargaining: once when it allowed the representation vote in respect to the Canadian Union of Public Employees' application referred to in paragraph 3 and again in respect to the Ontario Nurses Association who are certified for registered nurses at the Toronto depot. Standing by itself, all that this evidence does is indicate that, at the particular point where those applications were made, the Board found the units applied for appropriate for collective bargaining on the facts then available to it.

10. Having all of the foregoing in mind, the Board finds that the applicant has failed to bring forward any argument supported by evidence to show why the Board should deviate from its normal practice in a pre-hearing displacement vote of designating the voting constituency as the bargaining unit defined in the existing collective agreement. Accordingly, the Board will now proceed to dispose of the application in its normal manner.

11. The Board, having determined that the appropriate voting constituency is as set out below, and having examined the records of the applicant and the records of the respondent in connection therewith, finds that not more than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

All non-professional employees of the Society working at or out of the Toronto Blood Transfusion Centre, the Hamilton Blood Transfusion Centre, the Ottawa Blood Transfusion Centre and the London Blood Transfusion Centre, employed as clinical assistants, clerical staff, transport staff and laboratory helpers, save and except transport officers, the office manager (Toronto), office supervisor (Ottawa), centre secretary-stores accountant (Hamilton) and office supervisor (London), persons employed above these ranks, and those employed on a casual, part-time or temporary basis.

12. This application is therefore dismissed.

0031-78-R United Steelworkers of America, (Applicant), v. The Craig Bit Company Limited, (Respondent).

Certification – Termination – Representation Vote – Whether on application for certification to displace an employee association a vote must be held – No vote required when association has signified that it does not wish to represent the employees

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Lorne Ingle and James Keuhl for the applicant; M. J. Somerville and J. L. Page for the respondent.*

DECISION OF THE BOARD; May 23, 1978

1. The name “The Craig Bit Co. Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “The Craig Bit Company Limited”.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. This is an application for certification in which the applicant seeks to displace The Craig Bit Company Employees’ Union (hereinafter called the “Employees’ Union”) in the bargaining unit set out below.
4. There is no dispute that the Employees’ Union has represented employees of the respondent for some thirty-five years and has entered into collective agreements with the respondent.
5. The Employees’ Union did not file a formal intervention in opposition to the application. On the contrary, the Employees’ Union filed a letter, directed to the Registrar, dated April 14, 1978, having reference to the application. It reads as follows:

The Craig Bit Co. Employees’ Union,
180 Ninth Street,
North Bay, Ontario.
P1B 4G6
April 14, 1978

Re: Your File No. 0031-78-R

Mr. D. K. Aynsley,
Registrar,
Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4

Dear Sir: UNITED STEELWORKERS OF AMERICA,

and THE CRAIG BIT CO. LIMITED
(North Bay)

We have received notice from the Board in the above matter. We no longer wish to retain our bargaining rights for the above unit at Craig Bit Company Limited,

Yours truly,
Michael Quirt,
Chairman of the Council

Earl Roy,
Vice-Chairman of the Council

Alex Geisler,
Secretary Treasurer of the Council

Daniel Laframboise,
Member of the Council

The signatures were verified at the hearing by an officer of the Employees' Union.

6. It was the contention of the applicant that, in the circumstances of this case, a certificate should issue to it directly on the strength of its preponderant membership evidence and the letter of April 14, 1978, and that no vote should be directed. It should be remarked that the membership evidence of the applicant is very substantially above that required for certification.

7. At the hearing, evidence was led concerning meetings held by the Employees' Union at which the subject of representation by the Steelworkers was discussed and voted upon. The notice of meetings indicated that they were called with respect to negotiations. The evidence was that the employees were fully aware that the subject of change of unions would be a topic for discussion. The ballot used simply asked the question, "Are you in favour of the Steel Workers Union?". A large majority of the members voted in favour of the United Steelworkers.

8. The respondent argued that the notice of the above meetings referred only to a meeting with respect to negotiations and made no mention of a choice of bargaining agents and was therefore defective. It also submitted that the ballots were not proper because of lack of choice. The respondent therefore submitted that a representation vote ought to be directed by the Board.

9. Subsequent to the hearing which took place on April 24th, the respondent, under cover of a letter to the Board dated April 27, 1978, enclosed the following pieces of correspondence:

APRIL25/1978

MR. J. A. READ

This is to inform you that the Craig Bit Company Employees Union is ready & willing to commence negotiations with The Craig BIT Co Ltd.

Alex Geisler
(Sgd.) Alex Geisler
(Sec-Tres)

April 27, 1978

Mr. Alex Geisler,
Secretary – Treasurer,
The Craig Bit Company Employees' Union,
180 Ninth Street,
North Bay, Ontario. P1B 8G8

Dear Mr. Geisler:

Further to your note of April 25, 1978, The Craig Bit Company Limited is willing to begin negotiations with the representatives of The Craig Bit Company Employees' Union at 3:30 P.M. May 5, 1978, in the Company Board Room, for the purpose of negotiating a new shop agreement.

Yours truly,
The Craig Bit Company Limited
(Sgd). J. A. Read
J. A. Read
Vice-President and General
Manager

c.c. J. L. Page
Marc. J. Somerville
D. K. Aynsley

10. It is to be observed that Alex Geisler is a signatory to the letter of April 14, 1978 set out above. He was also one of the persons who testified at the hearing with respect to the calling of the meetings and the results of the votes which persuaded the executive to abandon its rights, with which decision he obviously agreed.

11. Not only is the notice to bargain wholly inconsistent with and contradictory to the intent to abandon bargaining rights set out in the letter of April 14th and the evidence with respect to its origins, but it is untimely, not only in that it was not signed until after the hearing, but also, through no fault of the respondent, it did not come to the attention of the Board until after the hearing. In any event, we are not prepared to give any weight to the document, particularly as a revocation of the clear intent of the Employees' Union was revealed by the evidence at the hearing.

12. Although we have taken time to review the evidence of the events leading up to the signing of the letter of April 14th because of the respondent's submissions based upon it, we hasten to point out that bargaining rights under the Act belong to the trade union involved and not to the employees. In the instant case, the Board is satisfied on all of the evidence that the Employees' Union, through its duly appointed officers, has abandoned the bargaining rights it held for employees in the bargaining unit set out below.

13. Although it is not mandatory under the Act, the Board has generally directed the holding of a representation vote in an application for certification where an applicant union is seeking to displace an incumbent. Where, however, the Board directed the holding of a representation vote between an applicant and an incumbent, and the incumbent, subsequent to the direction being made, notified the Board that it no longer claimed to represent the employees concerned, the Board revoked the direction. (See *The Marra's Bread Limited* case, [1965] OLRB Rep. June 156.) In the present case, the notice that the incumbent did not wish to represent the employees in the bargaining unit was, as already indicated, given to the Board prior to, and was confirmed at, the hearing.

14. In the present case, even if the incumbent had chosen to oppose the application rather than abandon its rights, the Board, in view of the fact that the applicant has filed membership cards on behalf of 80 employees out of 88 qualified for the count, would have difficulty in finding a reason for ordering a vote rather than, in the exercise of the discretion accorded it under the Act, issuing a certificate to the applicant without a vote.

15. In the result, therefore, the Board finds that in all of the circumstances of the present case there is no reasonable requirement for the holding of a representation vote between the applicant and the Employees' Union, and the application will be dealt with accordingly.

16. The Board further finds that all employees of the respondent company at North Bay, save and except foreman, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 17, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

1934-77-U International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant), v **Fleck Manufacturing Company**, Grant Turner, Bill McIntyre, Bill Freeth, Ray Glover and Jack Riddell, (Respondents).

Consent to Prosecute – Whether, by reason of the Legislative Assembly Act a member of the legislature is immune from proceedings before the Board while the legislature is in session – Board held no immunity

BEFORE: M. G. Picher, Vice-Chairman and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *L. A. MacLean for the applicant; Tim Sargeant, T. C. Churchmuch, W. Gibson Gray, W. R. Kitchen, James Bullbrook and Robert Kennedy for the respondents.*

DECISION OF THE BOARD; May 2, 1978

1. This is an application under section 90 of The Labour Relations Act asking the Board's consent to prosecute the respondents for alleged offences under the Act. The events in question relate to actions of the respondents prior to and during the current strike at the Huron Park plant of the respondent Fleck Manufacturing Company.

2. The respondent Jack Riddell, a member of the Legislative Assembly of Ontario, has raised a preliminary objection to the Board's jurisdiction to entertain the application made in respect of him. His objection gives rise to what appears to be a legal issue of first impression in this Province.

3. The allegation as against Mr. Riddell is that he breached The Labour Relations Act by means of statements made to the news media and to striking employees on the picket line. It is alleged that his statements were made on behalf of the respondent employer and that they interfered with the representation of the employees by their trade union, contrary to section 56 of The Labour Relations Act.

4. Mr. Riddell sits in the Legislative Assembly of Ontario as the representative of the Electoral District of Huron-Middlesex. The struck plant is located in Mr. Riddell's riding. Counsel for Mr. Riddell argues that this Board is without jurisdiction to hear any allegations made against him at this time by virtue of the privileges he enjoys as a member of the Legislature under sections 37 and 38 of the Legislative Assembly Act, R.S.O. 1970 c. 240. Those sections are as follows:

37. A member of the Assembly is not liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before the Assembly or a committee thereof.
38. Except for a contravention of this Act, a member of the Assembly is not liable to arrest, detention or molestation for any cause or matter whatever of a civil nature during a session of the Legislature or during the twenty days preceding or the twenty days following a session.

5. Counsel for Mr. Riddell did not ask the Board for a preliminary ruling in respect of the effect of section 37 upon its jurisdiction. He agreed that the determination whether the statements made by Mr. Riddell were sufficiently within the discharge of his duties as a member of the Assembly to fall under the section 37 privilege can only be made at the end of the hearing, in the light of all of the evidence adduced. He therefore restricted his motion and the Board accordingly confines this preliminary ruling to the application in these proceedings of section 38 of the Legislative Assembly Act. The sole issue, therefore, is whether, having regard to the time of the alleged statements, the time of the filing of the instant application and the time of the Board's hearings, Mr. Riddell is immune from the jurisdiction of this Board until the time of privilege described in section 38 of the Legislative Assembly Act has passed.

6. Counsel for Mr. Riddell does not claim for his client a blanket immunity from the Board's proceedings by virtue of that section. Rather, he asserts that the Board is without jurisdiction to proceed as against his client so long as the Legislature is in session or during the twenty days preceding and following a session. Mr. Riddell's statements are alleged to have been made between March 11 and March 15, 1978, inclusively. It is common ground that the Legislative Assembly of Ontario opened its present session on Tuesday, February 21, 1978 and that that session continued when the instant application was filed on March 17, 1978, when the Board held its first two days of hearings on April 20 and 26, 1978 and continues at the present time.

7. We turn now to the merits of the argument made on behalf of Mr. Riddell. His counsel submits that the word "molestation" in section 38 of the Legislative Assembly Act includes the commencement of any civil proceedings against a member of the Legislature. He argues, in other words, that during a session or the twenty day period before or after a session (hereinafter referred to as "the time of privilege") a member of the Assembly is immune from any legal proceedings of a civil nature. He maintains that an application before this Board for consent to institute a prosecution of Mr. Riddell is "of a civil nature" and may not, therefore, be made or entertained during the time of privilege. He submits, therefore, that any proceedings against the respondent Riddell before this Board can take place only after twenty days following the termination of the present session of the Legislature. In his view it is merely a necessary peculiarity of our law that the six-month limitation period in respect of the institution of proceedings by way of summary conviction for breaches of The Labour Relations Act might expire before the period of parliamentary privilege has passed and his client becomes subject to the jurisdiction of this Board. In other words, it is implicit in his argument that, depending on the length of the present session of the Legislature, Mr. Riddell's temporary immunity might become permanent immunity.

8. When a public statute like The Labour Relations Act provides for its enforcement by means of prosecution and penalties that are criminal in nature after screening proceedings before a statutory tribunal entrusted with the administration of that Act, the argument made on behalf of Mr. Riddell has serious consequences for the scope of the rule of law in labour relations. It likewise has serious ramifications for the rule of law and the accountability of legislators in all civil proceedings in this Province.

9. There appear to be no reported judicial decisions that have interpreted the meaning of section 38. Since it is raised in these proceedings and is pleaded as a matter corollary to our jurisdiction, we must endeavour to construe it as it applies to proceedings under section 90 of The Labour Relations Act.

10. No one can seriously dispute the importance of parliamentary privilege in any parliamentary democracy. It is vital to the interests of any legislative body and to the interests of the community that it serves that its members enjoy the fullest freedom from interference in the discharge of their law-making duties. It is for that reason that parliamentary privilege exists and must be protected. The present scope of that important protection can only be understood through an appreciation of its historic evolution.

11. Parliamentary privilege originated as a common law prescriptive right insofar as it applied to the British House of Commons. In its origins it was broad enough to immunize any member of that House from any civil suits or actions at any time during their tenure of office. As the 19th Edition of Erskine May, *Parliamentary Practice* relates at p. 95 in its discussion of *Atwyll's case*,

In 1477 the Commons affirmed that the privilege 'that they should not be impleaded in any action personal,' had existed 'whereof tyme that mannys mynde is not the contrarie' (6 Rot. Parl 191), thus placing it on the ground of prescription, and not on the authority of statutes then in force.

12. It appears that in those earliest times the term "molestation" was taken to include the institution of any civil proceedings against members of the Houses of Parliament, as reflected in the following passage quoted in May:

"In connection with most early Assemblies that were in any way identified with the King, is to be found some idea of a royalty sanctioned safe conduct; the King's peace was to abide in his Assembly and was to extend to the Members in coming to it and returning from it. Naturally, these royal sanctions applied to Parliament. But as time went on, molestation of Members was more likely to be through some process of law than through direct bodily injury or restraint. Unless Parliament could keep its membership intact, free from outside interference, whether or not the interference was with the motive of embarrassing its action, it could not be confident of any accomplishment." (White, Eng. Const. p. 439).

13. So from the time of Edward II members of both Houses of Parliament enjoyed protection from molestation through the civil process of law. The privilege was never claimed, however, as shelter from arrest in relation to criminal charges which were themselves offences against the protector King.

14. In its very earliest form parliamentary privilege was claimed as a prescriptive right of immunity from arrest in civil proceedings. But the view of what constituted molestation grew in time and in 1477 in *Atwyll's case* (above) the Commons first asserted the broader position that they could not be made the subject of any civil action. From that time until 1700 the members of both Houses of Parliament were viewed as having a prescriptive immunity from all civil proceedings.

15. As history relates, those privileges became the subject of considerable abuse over the centuries. (see de Smith "Parliamentary Privilege and the Bill of Rights". (1958) 21 Mod. L.R. 465). The privilege came to apply not only to peers and members of the House of Commons, but also extended to their families and servants. Particularly in the 18th century, in

the excesses of the “rotten boroughs”, certain members used the privilege in order to escape lawful debts owed to creditors who were unable to institute or continue actions for debt against them. Finally Parliament was forced into reforms of the privileges of its members to end that abuse.

16. By three statutes (passed in 1700, 1703 and 1738, 12 & 13 William III c.3, 2 & 3 Anne c.18, 1 Geo. II c.24 respectively) it sought to reduce the scope of parliamentary privilege. Those statutes restricted the times during which parliamentary privilege would apply as well as the classes of persons who would have its protection. The cumulative effect of those laws was to restrict the immunity of members of the Houses of Commons from civil proceedings to the “time of privilege” which came to be viewed as the times during which Parliament was in session and for the period of forty days before and after a session. While there is no certainty about it, May attributes the forty day period to the fact that in those days of long distances writs of summons for a parliament were always issued at least forty days before its appointed meeting.

17. While the three statutes rendered members liable to civil proceedings at times other than the time of privilege, they expressly protected members from arrest or imprisonment in relation to any civil proceedings.

18. Those first statutory attempts to curb abuses of parliamentary privilege did not succeed. Finally, in 1770, the *Parliamentary Privileges Act* was passed to abolish immunity of Members of Parliament from civil proceedings. The preamble to that statute stated that the earlier laws had been “insufficient to obviate the Inconveniences arising from the Delay of Suits by reason of Privilege of Parliament”. It then went on:

... be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, that from and after the Twenty-fourth Day of June One thousand seven hundred and seventy, any Person or Persons shall and may, at any Time, commence and prosecute any Action or Suit in any Court of Record, or Court of Equity, or of Admiralty, and in all Causes Matrimonial and Testamentary, in any Court having Cognizance of Causes Matrimonial and Testamentary, against any Peer or Lord of Parliament of Great Britain, or against any of the Knights, Citizens, and Burgesses, and the Commissioners for Shires and Burghs of the House of Commons of Great Britain for the Time being, or against their or any of their menial or any other Servants, or any other Person intitled to the Privilege of Parliament of Great Britain; and no such Action, Suit, or any other Process or Proceeding thereupon, shall at any Time be impeached, stayed, or delayed, by or under Colour or Pretence of any Privilege of Parliament.

Provided nevertheless, and be it further enacted by the Authority aforesaid, That nothing in this Act shall extend to subject the Person of any of the Knights, Citizens, and Burgesses, or the Commissioners of Shires and Burghs of the House of Commons, of Great Britain for the Time being, to be arrested or imprisoned upon any such Suit or Proceedings.

Thus from 1770 to the present Members of Parliament could assert no general privilege with respect to the institution of civil proceedings against them. Arrest and imprisonment in relation to those proceedings was, however, recognized as a form of molestation and interference with the discharge of their duties. Their privilege in that regard continued and has continued unchanged to this day. In England from then to now, the arrest, imprisonment, detention or attachment of Members of Parliament in relation to matters of debt and other civil actions has been viewed as molestation and breach of their privilege. The instituting and maintaining of civil actions has not.

19. The law appears to be identical as it applies to members of the Parliament of Canada. The privileges of the members of the Senate and House of Commons were first established in section 18 of the British North America Act. That section was repealed and re-enacted by section 18 of the Parliament of Canada Act, 1875, 38-39 Vict., c.38 (U.K.) which provides:

“The Privileges Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.”

20. The effect of that section is to grant to federal members of Parliament the same privileges and immunities that were held by members of the House of Commons of the United Kingdom in 1875. They do not, therefore, have complete immunity from civil actions since that immunity had been removed from their British counterparts for over 100 years at the time of the 1875 statute. The issue then becomes whether members of the Legislative Assembly of Ontario enjoy greater privileges and immunities than their peers in Ottawa and Westminster.

21. The Legislative Assembly of Ontario was established by section 69 of the British North America Act. That statute did not, however, invest any parliamentary privileges and immunities in the members of the Legislature. In 1876 by 39 Vict. c.9 the Legislative Assembly of Ontario enacted what has come to be the present section 38 of the Legislative Assembly Act. In its original form it was as follows:

“Except for any breach of this Act, no member of said Assembly shall be liable to arrest, detention or molestation for any debt or cause whatever of a civil nature within the legislative authority of this Province, during any Session of the Legislature, or during the twenty days preceeding or the twenty days following such Session.”

Section 38 in its present form, which omits reference to “debt.” and the legislative authority of the Province, first appeared as Section 47 of the Legislative Assembly Act, S.O. 1908 c.5.

22. The authority of the Legislature to enact section 38 of the Legislative Assembly Act has been expressly recognized by the Courts (see the decision of the Ontario Court of Appeal in the *Reference concerning Legislative Privilege* (the *Ziemba case*) as yet unreported,

Jan. 24, 1978). In a system founded on the supremacy of parliament few would doubt that the Legislative Assembly of Ontario could enact for its members an immunity from all civil actions in matters within its legislative competence. The question in these proceedings is whether, as Mr. Riddell contends, it has done so through the enactment of section 38.

23. We think not. In our view section 38 of the Legislative Assembly Act must be interpreted as giving to members of the Legislature of Ontario the same privileges and immunities from arrest, detention or committal in matters relating to civil proceedings as have been enjoyed by members of the British House of Commons and the Parliament of Canada since 1875, and nothing more.

24. We find that the Legislature did not intend, by the enactment of section 38 of the Legislative Assembly Act, to impose on the citizens of this Province the potential for the same mischief that was done away with by the English Statute of 1770. In argument counsel for Mr. Riddell conceded, as he must, that if his interpretation of the word "molestation" in that section is correct, a member of the Legislative Assembly who had, for example, negligently run over and killed a child while driving his automobile could not be made the subject of a civil action in respect of that serious event during the time of privilege described in section 38. In our view that is not the law in Ontario.

25. When section 38 was enacted in 1876 the scope of the privileges of members of Parliament both in Britain and Canada was well settled and the word "molestation" did not have so broad a meaning as to include the institution of any civil proceedings. The 19th and 20th century meanings of the word "molestation" are well enunciated in May's 19th Edition, pp. 148 to 153. It is clear that arrest in execution of a civil judgment and to secure the payment of a civil debt is viewed as "molestation" and in breach of the privileges of a member of a legislative body (*Harrison's case* (1880) 14 CH. D.533) but where the defiance of the order or proceedings of a civil court amounts to an open contempt, sometimes referred to as quasi-criminal contempt, a number of modern cases have held that parliamentary privilege does not apply (see May, pp.107-108).

26. In modern usage "molestation" most often refers to threats, harassment and actual physical abuse of members of a legislative body. Some examples are: challenging a member to fight on account of his actions in the House (*Swift's case* C.J. (1780-82) 535, 537; *O'Donoghue's case* C.J. (1862) 64); sending insulting letters to members relating to their actions in parliament, (*Woodcock's case* (1830-31) 285, 335) and inciting the readers of a newspaper to barrage a member with telephone calls complaining of his actions in House proceedings (*The Sunday Graphic*, C.J. (1956-57) 31, 50). The Legislative Assembly of Ontario has the power to deal with molestation of that kind by its own contempt proceedings enumerated in section 45 of the Legislative Assembly Act.

27. In the light of those examples it may be that the institution of civil proceedings which are on their face frivolous and vexatious and are calculated to embarrass a member or interfere with the normal execution of his duties would amount to "molestation" within the meaning of section 38 of the Legislative Assembly Act. But in the instant case, given the particulars alleged in the material filed by the applicant, that is not the case; if the facts alleged against Mr. Riddell are proved there is an arguable case as to whether breaches of The Labour Relations Act have occurred and whether this Board's consent to a criminal prosecution should issue.

28. Are there any common law privileges enjoyed by Mr. Riddell that would be a bar to our jurisdiction? Section 52 of the Legislative Assembly Act expressly reserves to a member of the Assembly all rights, immunities, privileges or powers that he might, but for the provisions of that Act, have otherwise been entitled to exercise or enjoy. Do members of the Legislative Assembly of Ontario enjoy by prescriptive right the same immunities from civil proceedings that were held through usage by members of the Imperial Parliament from 1477 to 1770? The highest judicial authority suggests that they do not.

29. In *Kielley v. Carson* (1842) 4 Moore P.C. 64 the Judicial Committee of the Privy Council held that in the absence of express statutory authority, the House of Assembly of Newfoundland did not have the inherent authority enjoyed by the Parliament of Westminster to prosecute and commit a subject for threats and insults amounting to contempt out of the House. In the leading decision on this point Baron Parke wrote for the Committee that a local legislature does not possess the ancient privileges held by custom at Westminster unless those privileges are clearly and expressly granted in the constitutional document of the British Parliament by which that Legislature is established (as was the case with the Parliament of Canada by virtue of section 18 of the British North America Act). The common law privileges and powers impliedly enjoyed by a legislature and its members are no more, in the words of the Judicial Committee, "than such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute".

30. The test to be applied, therefore, is whether complete immunity from civil proceedings for its members during the time of privilege is necessary to the functioning of the Assembly of Ontario. It is difficult to see how so broad a privilege could be said to be necessary to the functioning of that body when it has not been necessary to the functioning of the Parliament of Canada since 1867 nor to the Parliament of the United Kingdom since 1770. We therefore find nothing in the common law giving rise to an inherent privilege in Mr. Riddell that would stay these proceedings even if they could be described as being of a civil nature.

31. That brings us to the second branch of our interpretation of section 38. The argument advanced on behalf of Mr. Riddell also fails for the fundamental reason that proceedings by way of application for consent to prosecute under section 90 of The Labour Relations Act are not proceedings of a "civil nature" within the meaning of section 38 of the Legislative Assembly Act. The Supreme Court of Ontario has determined that certification proceedings before this Board are not a "civil suit" or an "action" (*Re Dorothea Knitting Mills Ltd.* (1975) 9 O.R. (2d.) 378 at 384). An application for consent to prosecute is less civil and more criminal in nature than certification proceedings. The Board has in the past characterized consent to prosecute proceedings as quasi-criminal (see *Hydro-Electric Power Commission of Ontario* [1965] OLRB Rep. Apr. 35; *A.L. Watson Ltd.* [1964] OLRB Rep. Sept. 436 and in the requirement to establish before it a *prima facie* case of a breach of the Act has analogised those proceedings to the preliminary hearing in the criminal courts.

32. By providing for the enforcement of The Labour Relations Act by means of criminal prosecution for breaches of its provisions the Legislature expressed its intention that full force and effect be given to the provisions of that statute. It would be inconsistent to suppose that the Legislature would have exempted its own members from the penal provisions in The Labour Relations Act by virtue of section 38 of the Legislative Assembly Act. And that is especially so where a fine is the only sanction imposed and there is no possibility

of arrest or imprisonment of a respondent who is prosecuted for a breach of The Labour Relations Act.

33. The view that the Legislature did not intend its members to be immune from prosecution for acts in breach of The Labour Relations Act finds support in May. At p. 103 (19th ed.) the author notes that parliamentary privilege has never extended to criminal proceedings and states:

“In early times the distinction between ‘civil’ and ‘criminal’ was not clearly expressed. It was only to cases of ‘treason, felony and breach (surety) of the peace’ that privilege was explicitly held not to apply (see p.93). Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanours, in the growing list of statutory offences, and, particularly, in the case of preventive detention under emergency legislation in times of crises, there was a debatable region about which neither House had until recently expressed a definite view. *The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character.* This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641: ‘Privilege of Parliament is granted in regard to the service of the Commonwealth and is not to be used to the danger of the Commonwealth’.”

(emphasis added)

34. In light of the foregoing we are satisfied that the instant proceedings are sufficiently criminal in nature as to be outside the scope of what is contemplated in section 38 of the Legislative Assembly Act.

35. For the purposes of clarity we summarize our conclusions as follows:

- 1) If the Board’s proceedings under section 90 of The Labour Relations Act are of a civil nature within the meaning of section 38 (a proposition which we expressly reject) then:
 - a) The term “molestation” in section 38 of the Legislative Assembly Act refers primarily to physical detention, arrest or committal in relation to civil proceedings, and not to the mere institution and hearing of civil proceedings;
 - b) If “molestation” in section 38 includes harassment of a member by the institution of civil proceedings which are frivolous and vexatious, there is nothing on the face of the instant application to establish such an abuse.
- 2) In fact, the Board’s proceedings in respect of an application for consent to prosecute are “quasi-criminal” or sufficiently criminal in nature as to be outside the scope of proceedings of a civil nature contemplated by section 38 of the Legislative Assembly Act.

36. For the above reasons, we are satisfied that there is nothing in section 38 of the Legislative Assembly Act to impede the jurisdiction of this Board to entertain an application for consent to prosecute Mr. Riddell.

37. Following our oral ruling to this effect at the hearing counsel for Mr. Riddell advised the Board that he intended to proceed to have our preliminary determination judicially reviewed in the Divisional Court of the Supreme Court of Ontario. He then requested that we adjourn the instant proceedings pending the outcome of that application. After some deliberation the Board declined the request for an adjournment. In this regard it considered, apart from the need for expedition generally in matters of labour relations, the particular need for expedition in this case in light of the six-month limitation period attaching to prosecutions by way of summary convictions for breaches of The Labour Relations Act. To grant the adjournment to the respondent Riddell might, because of time constraints, have the practical effect of entirely defeating the instant application. In that circumstance we should not exercise our discretion to adjourn pending the outcome of an application for judicial review (*Re Cedarvale Tree Services Ltd.* [1971] 3 O.R. 872 (C.A.)).

0651-77-R International Union of Operating Engineers, Local 793,
(Applicant), v. **J. & M. Chartrand Realty Limited**, (Respondent).

Certification – Construction Industry – Employees considered members of craft in which they are employed for majority of their time – Board determination not restricted to work done on application date – Repair shop employees considered more appropriate for inclusion in industrial unit and accordingly excluded from construction unit

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *S.B.D. Wahl, E. Ford and M. Quinn appearing for the applicant; Peter Thalheimer and Robert A. Riopelle appearing for the respondent.*

DECISION OF THE BOARD; May 18, 1978

1. The Board finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

2. The Board further finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

3. Pursuant to the provisions of section 6(2) of the Act, the Board finds that all employees of the respondent working within a fifty mile radius of the Timmins Federal Building employed in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The respondent filed a Schedule "A" listing thirty-one employees as having been employed in the bargaining unit on the date of the making of the application. The accuracy of this list was challenged by the applicant and as a result of this challenge the Board conducted an inquiry into the list and composition of the bargaining unit.

5. At the commencement of the hearing held with respect to the list and composition of the bargaining unit, the parties reached agreement that the following employees had properly been included on the list of employees, namely:

Jim Burnett/Charles Caron

Lionel Chiasson/Bob Joannis

Andre Larose/Roger Pelletier

Roch Plouffe/Frank Riopel

6. At various points throughout the hearing counsel for the respondent agreed with the applicant's contention that the following names should not have been included on the list of employees, namely:

Claude Gagne/George Gagne

Gerry Gagne/Guy Gagne

Jacques Landry/Leo Pelletier

Robert Perrier/Yvon Riopel

Mario Rivet/Rheo Rousson

7. On and during the period leading up to the application date the respondent was engaged on a number of building projects in the Timmins area. Because of the nature of the work involved, a fair degree of use was made of the type of equipment referred to in the bargaining unit description. The respondent employs a number of men to work almost exclusively in operating such equipment. However, a sizeable number of additional employees also operate the equipment when the need arises. Certain of these additional employees were included on the list of employees filed by the respondent, and have been challenged by the applicant.

8. With respect to the construction industry, it is the Board's practice where employees are engaged in the work of different crafts, and are paid only one rate, to characterize the craft in which they are employed for a majority of their time as the one governing their status on an application for certification. (See: *O.J. Gaffney Limited* [1964] OLRB Rep. Aug. 233). However, in seeking to determine the craft in which an employee was employed for a majority of the time, the Board looks not simply to the actual date of the making of the application, but rather to a period of time leading up to the date of the application. (See: *Heath Construction Inc.* [1977] OLRB Rep. Oct. 691). The application in this matter was filed on July 15, 1977. The Board is of the view that in the circumstances of this case, the relevant time period to be taken into account is that part of the month of July 1977 up to and

including July 15th. In fixing this time period the Board has in large measure been guided by the fact that counsel for both parties generally limited their detailed questioning of employees to the month of July. It is apparent that individual employees of the respondent received the same rate of pay no matter what type of work they were engaged in at any given point in time.

9. Before proceeding any further, reference should be made to certain documents which were filed by the respondent. These documents take the form of daily time sheets which were prepared by the respondent's foremen. Each daily time sheet lists the men and equipment employed on a particular job site on the day in question. As a general rule one cannot determine from these time sheets which employees actually operated the equipment listed. The exception to this is where a foreman's time sheet lists only one employee and one piece of equipment. A number of such time sheets were filed with respect to the date of the making of the application. It was the contention of counsel for the applicant that many of these documents had not in fact been prepared at the relevant time in the normal course of the respondent's business but had instead been prepared solely for the purpose of these proceedings. The Board rejects this submission in its entirety. For the documents to have been fabricated as alleged would have required the active cooperation of the foremen involved, Mr. Frank Young who is the respondent's secretary-treasurer, as well as the respondent's pay master. The evidence before the Board does not even suggest that any of these individuals might in fact have engaged in any such improper conduct.

10. The evidence in so far as it relates to the amount of time spent by Mr. Raymond Charette in operating equipment is somewhat contradictory. However, on balance the Board is satisfied that in the first half of July, 1977, Mr. Charette did in fact spend a majority of his time as an equipment operator and that his name is properly included on the list of employees.

11. The evidence with respect to Mr. Germain Chartrand is also somewhat contradictory. However, the Board is satisfied, particularly on the basis of the evidence of Mr. Chartrand himself, that in the period from July 1st to 15th, 1977 he did not spend a majority of his time as an equipment operator. As a result the Board rules that his name was not properly included on the list of employees.

12. The evidence establishes that Mr. Marcel Cote and Mr. Lorenzo Gastonguay performed a variety of job functions. However, the Board is satisfied that during the relevant time period they were primarily employed as equipment operators and thus properly included on the list of employees.

13. Mr. Richard Lozon is a student who worked for the respondent over the summer months in 1977. Mr. Lozon attends school in the Province of Quebec and was not available to testify before the Board, although three other witnesses did touch briefly on the type of work he had performed. It is clear that Mr. Lozon was taught how to operate a small loader by Mr. Denis Chartrand and that on a few occasions he operated a compactor under the direction of Mr. Guy Roy. The Board is of the view, however, that in all likelihood Mr. Lozon was not engaged in operating equipment for a majority of his time and that therefore he should not have been included on the list of employees.

14. The Board is satisfied that although Mr. Brian Roy was called upon a number of

times to operate equipment, he was so engaged for less than half his time during the period in question. In these circumstances the Board is of the view that Mr. Brian Roy should not have been included on the list of employees.

15. The Board is satisfied on the evidence that Mr. Rene Roy was an employee in the bargaining unit on the date of the application and that therefore his name was properly included on the list of employees.

16. Mr. Mario Normando also did not testify, although a good deal of evidence concerning his activities was placed before the Board. It is apparent that Mr. Normando did from time to time operate equipment, and that he did so on July 15, 1977. However, the Board is satisfied that during the first half of July he did not spend a majority of his time so engaged. This being so the Board is of the view that his name should not have been included on the list of employees in the bargaining unit.

17. At the relevant time the respondent operated a gravel pit utilizing the gravel both for its own purposes and to sell to other companies in the Timmins area. Mr. Ernest Cloutier, who appears on the list of employees, was at the relevant time employed at the pit as the operator of a loader. The Board is of the view that the respondent's gravel pit operation does not come within the construction industry and that the employee involved would more appropriately be included in an industrial bargaining unit. (See: *Fielding Construction Company* [1970] OLRB Rep. Jan 1205). This being the case the Board is satisfied that on the application date Mr. Cloutier was not an employee in the bargaining unit.

18. The respondent employs a number of men at its repair shop to do repair and maintenance work on both construction equipment and trucks. The Board's general practice is to regard as coming within construction industry bargaining units of operating engineers those employees who work on construction sites and are primarily engaged in the repair and maintenance of cranes, shovels, bulldozers and similar equipment, but to regard as being outside the scope of such units employees who work in repair shops. Generally repair shop employees will be included in industrial bargaining units. (See *Fielding Construction Company*, op. cit.) In the instant case the employees involved are based in the repair shop and most of the respondent's maintenance and repair work seems to be done at the shop. Frequently, however, the shop employees do go into the field to do maintenance and minor repair work on equipment. Notwithstanding this latter fact, the Board is satisfied that the employees based in the shop are, as a group, essentially off-site employees who would be more appropriately included in an industrial bargaining unit with other off-site employees rather than in a unit with on-site construction employees.

19. Having regard to the above conclusion, and for the purposes of clarity, the Board declares that employees based in the respondent's repair shop do not come within the bargaining unit.

20. The Board is satisfied that the following employees who are based in the respondent's repair shop should not have been included on the list of employees in the bargaining unit, namely:

Claude Lapointe

Raoul Roy

Rene Taillefer; and

J. Trudelle.

21. Having regard to the above findings, the Board is of the view that the proper list of employees in the bargaining unit as of the application date is as follows:

Jim Burnett/Charles Caron

Raymond Charette/Lionel Chiasson

Marcel Cote/Bob Joannis

Andre Larosse/Roger Pelletier

Roch Plouffe/Frank Riopel

Rene Roy/Lorenzo Gastonquay

22. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 3, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant.

1120-77-R Raymond Albert Lambert, (Applicant), v. Ottawa Newspaper Guild, Local 205, (Respondent), v. **The Journal Publishing Company of Ottawa, Limited**, (Intervener).

Termination – Bargaining unit determined with reference to collective agreement scope clause excluding certain temporary employees – Clause found not to exclude strike replacements – Strike replacements found to be employees in the unit eligible to bring application

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *J. R. Scott for the applicant; C. M. Mitchell for the respondent; H. Beresford for the Intervener.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; May 9, 1978

1. This is an application made under section 49 of the Act for a declaration from the

Board terminating the bargaining rights of the respondent trade union. Under section 49 of the Act the Board must decide if not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the trade union. This application was filed on October 13, 1977.

2. The Board has issued interim decisions in this matter which are dated December 2, 1977, March 7, 1978 and March 28, 1978. The Board described the remaining issue to be dealt with in this matter at para. 7 of its March 28th decision in the following terms:

“It remains for the Board to determine if not less than forty-five per cent of the employees in the bargaining unit have affixed their signatures to the statement of desire which the Board has found to be a voluntary expression of those who signed it. The bargaining unit in the instant case excludes from its scope “temporary employees employed on a special project for a limited time.” The respondent takes the position that the replacement employees fall within this exclusion and are, therefore, beyond the scope of the bargaining unit. If the Board accepts the respondent’s argument it must find that less than forty-five per cent of the employees in the bargaining unit signed the statement of desire and dismiss the application.”

The Board concluded its March 28th decision as follows:

“The Board, therefore, directs the Registrar to put this matter on for continuation for the purpose of hearing evidence and argument in respect of whether any or all of the replacement employees are excluded from the scope of the bargaining unit.”

3. At the outset of the hearing which took place on April 24, 1978, counsel for the respondent union advised the Board that he had expected the Board to assume carriage and conduct an examination of the persons whose status as bargaining unit employees had been challenged. Counsel for the union reminded the Board that he had requested the appointment of an examiner from the outset. The Board acknowledged that counsel for the union had made a request for an examiner but reminded counsel for the union that he had stated to the Board at the conclusion of the previous day’s hearing that he “might only have to call 36 of the 48 persons whose status was in dispute.” In the face of this remark, which the Board construed as an alternative position, and in the face of an earlier settlement to the labour dispute which facilitated an agreement of the parties with respect to the employee schedules (other than with respect to the single issue presently before the Board) the Board framed its March 28th decision in such a way as to make it clear that it was not appointing an examiner or conducting an inquiry. Counsel for the union was in receipt of the Board’s March 28th decision approximately one month prior to the April 24th hearing and chose not to raise his concern until the day of the hearing. The Board hereby confirms its oral decision given at the hearing. The Board ruled that it was not prepared to appoint an examiner and that the onus was upon the union to establish that the persons it challenged are excluded from the scope of the unit. The Board advised the respondent that it was prepared to hear whatever evidence and argument it was prepared to present.

4. The scope clause of the previous collective agreement, which is the operative document for purposes of this application, reads:

“This Agreement shall extend to and cover by its provisions all employees in the Circulation Department of the Publisher save and except the Circulation Manager, Assistant Circulation Manager, secretary to the Circulation Manager, employees hired to work regularly for 24 hours or less per week, *temporary employees employed on a special project for a limited time*, or a student employed during his vacation. The duration of employment in a calendar year for any one temporary employee shall not exceed a total of five months.” (Emphasis added)

The Board is called upon to decide if the persons hired as replacements for those employees who were locked out are excluded from the scope clause of the collective agreement by reason of the exclusion of “temporary employees employed on a special project for a limited time.”

5. The Board admitted evidence as to the past practice of the parties in respect of this exclusion, subject to it making a finding that the clause is ambiguous. Counsel for the intervenor company argued in the alternative that the clause is not ambiguous and that the Board, therefore, should not consider the extrinsic evidence before it. Counsel for the employer submitted dictionary definitions of the words “temporary”, “special” and “limited” in support of his argument. In the absence of a contractual definition of the term temporary and in the face of the term “special project” which is inherently ambiguous, the Board finds that the clause is ambiguous and that it is entitled to consider the past practice of the parties as an aid in determining their intent.

6. The parties have excluded from the collective agreement as “temporary employees employed on a special project for a limited time,” persons hired to act as vacation replacements, persons hired to act in relief of bargaining unit employees absent due to sickness or maternity leave, and persons hired to work during periods of peak workload. The evidence establishes that the clause has served to exclude from the bargaining unit persons who have been used in a replacement capacity. The union takes the position that the persons hired to take the place of those who were locked out were also hired in a replacement capacity and are, therefore, excluded from the bargaining unit. Although the clause has never served to exclude a person hired as a replacement employee during the course of a labour dispute, the language, when construed in light of the extrinsic evidence, is open to the interpretation which the union wishes to place upon it.

7. The evidence also establishes, however, that persons who have been excluded from the scope of the agreement pursuant to this clause have never been involved in the pension plan, provided with company paid benefits or allowed to take paid vacation periods. The employment relationship of persons previously excluded under this clause has never exhibited these characteristics of permanency. The persons who were hired by the company as replacements for those who were locked out and who remained with the company as of the date of the application for termination of bargaining rights were enrolled in the company pension plan, were provided with company paid benefits and paid on a salary or wage grid. Further, there was no fixed event which would automatically lead to the termination of these replacement employees as there had been with the persons who had previously been excluded under the clause. The extrinsic evidence, therefore, establishes that the employees whose status has been challenged were treated differently and enjoyed a different relationship with the employer than did the persons previously excluded under the clause.

8. The clause must be construed within the collective bargaining framework. It is well established in this jurisdiction that employers are permitted to hire strike or lock-out replacements who, in the normal course, are considered to be within the bargaining unit and who are entitled to initiate termination of bargaining rights proceedings and to vote in any subsequent representation vote. (See re *Journal Publishing Company of Ottawa*, [1977] OLRB Rep. Nov. 748, *Custom Aggregates*, Board File No. 0140-77-R, dated March 23, 1978, *Brooker Trade Bindery*, [1973] OLRB Rep. Dec. 612.) The interpretation urged by the union would result in a significant alteration of the status quo and would produce the unusual result of excluding from the bargaining unit all of the persons engaged in carrying on the day to day work of the employer during the period of the dispute. More importantly, however, the persons whom the union seeks to exclude are persons who could only be hired after the agreement ceased to operate (i.e. during the course of a legal strike or lock-out). The union asks the Board to accept that the parties put their minds to an exclusion which could only have meaning after the collective agreement ceased to operate. The Board is not aware of a single collective agreement which bears such an exclusion.

9. Without commenting on the legality of an explicit exclusion from the bargaining unit of all persons hired during the course of a labour dispute, the Board is of the view that if it was the intention of the parties to exclude such persons they would have done so by clear and unambiguous language. The parties have failed to provide in clear and unambiguous language for the exclusion of persons hired during the course of a labour dispute and in the result the Board is not prepared to interpret the exclusion of "temporary employees employed on a special project for a limited time" as extending to such persons. It is the finding of the Board that the clause was not intended by the parties to exclude from the bargaining unit persons hired during the course of a labour dispute. Accordingly, it is the further finding of the Board that these persons are within the scope of the bargaining unit as set out in Article 1(a) of the previous collective agreement between the parties.

10. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of The Journal Publishing Company of Ottawa, Limited in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of October 26, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

11. The Board directs that a representation vote be taken of all employees of The Journal Publishing Company of Ottawa, Limited in the Circulation Department of the Publisher save and except the Circulation Manager, Assistant Circulation Manager, secretary to the Circulation Manager, employees hired to work regularly for 24 hours or less per week, temporary employees employed on a special project for a limited time, or a student employed during his vacation, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

12. Voters will be asked whether or not they wish to be represented by the respondent union in their employment relations with The Journal Publishing Company of Ottawa, Limited.

13. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES:

I would have dismissed the application for termination for reasons given in my dissent dated March 28, 1978. It follows, therefore, that I cannot agree with my colleagues in their decision to order a vote resulting from that application.

2052-76-R Labourers' International Union of North America, Local 183,
(Applicant), v. Kaneff Properties Limited, (Respondent).

Certification – Bargaining Unit – Painters, maintenance staff and cleaning staff all included in a single bargaining unit

BEFORE: M. G. Picher, Vice-Chairman and Board Members H. J. F. Ade and H. Simon.

APPEARANCES: *S. B. D. Wahl for the applicant; W. G. Phelps for the respondent.*

DECISION OF THE BOARD; May 17, 1978.

1. There are two outstanding issues in this application for certification. The first is whether on the date of application Mr. Eric Dischleit described by the respondent as a "resident superintendent" should be excluded from the bargaining unit as being managerial or employed in a capacity that is confidential in matters of labour relations. The second issue is whether the bargaining unit should include painters and maintenance personnel, as well as cleaning staff employed in the respondent's apartment building, located at 2170 Sherobee Road, Mississauga.

2. We deal firstly with the status of Mr. Dischleit. Counsel for the respondent took issue with the credibility of Mr. Dischleit both during the examiner's hearings and at the Board's hearing on the contents of the examiner's report. We agree with counsel for the respondent that the transcript as a whole tends to cast doubt on the credibility of certain aspects of Mr. Dischleit's testimony. The Board, therefore, bases its finding on the testimony of Miss Gabriella Cavassini, Property Manager of the building in which Mr. Dischleit was employed, Boyan Sprostranov, a painter employed by the respondent, and Margaret McDonough, formerly employed as a cleaner by the respondent.

3. Having regard to the evidence in their testimony, the Board is satisfied that Mr. Dischleit's duties are more like those of a lead hand than a foreman and that he is not excluded from the bargaining unit by virtue of section 1(3)(b) of The Labour Relations Act. As was suggested in the testimony of Mr. Sprostranov, there is little doubt that Mr. Dischleit exhibited an authoritarian style in the way he discharged his functions as a resident superintendent. But it is the authority that goes with the job and not the personality of the individual holding the job, that must be the Board's concern in these proceedings.

4. Mr. Dischleit's primary job was cleaning the apartment building of which he was the resident superintendent. The great bulk of his time was spent in cleaning work, with a small portion being allotted to the co-ordination of duties among the four other part-time and full-time employees also engaged in cleaning and to certain clerical functions both in keeping the time of those employees and the renting of vacant apartments.

5. While Mr. Dischleit was involved in the termination and hiring of employees, he had no independent power of decision in that regard. As Miss Cavassini put it, the final decision on these vital matters was her own and any recommendation made by Mr. Dischleit would not be unquestioningly implemented, but would be viewed in the context of the past performance of the persons in question. We are satisfied, on the balance of probabilities, that in this regard the input of Mr. Dischleit was in fact more the making of a comment or report by an employee than the exercise of the power of effective recommendation by a foreman. His role in hiring Mr. Galloway as a cleaner when that gentleman was the first respondent to the employer's advertisement when Mr. Dischleit's instructions were to put the first suitable applicant to work, falls short of establishing in Mr. Dischleit the kind of responsibility that would bring him within the exception contemplated in section 1(3)(b) of the Act.

6. We turn now to the issue of the scope of the bargaining unit as it relates to the maintenance men and painters employed by the respondent. In this regard it must be borne in mind that the Board is called upon to determine an appropriate unit of employees for collective bargaining, and not to enunciate what might be the ideal bargaining unit in the abstract, (*The Board of Education for the City of Toronto* [1970] OLRB Rep. July 430) and that, when employees in a grouping that is suitable for collective bargaining indicate their willingness to be represented by a given bargaining agent, they should not be effectively denied access to their rights under The Labour Relations Act merely because alternative and more comprehensive delineations of employees are possible (*Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330).

7. According to the criteria enunciated in the *Usarco* case [1967] OLRB Rep. Sept. 526, the cleaning staff are an appropriate unit for collective bargaining apart from the maintenance staff. The nature of the work performed by each group is different. Different skills are employed and there is little functional interdependence between cleaners and maintenance staff. There is, moreover, no interchange of employees from one function to the other. A final and telling factor is the geographic separation of the two groupings. The cleaning staff spend all of their time in the building at 2170 Sherobee Road. The maintenance staff, on the other hand, divide their working time in varying degrees among a number of apartment buildings operated by the respondent. A rational collective bargaining structure might, therefore, contemplate their inclusion in either an all-employee unit that would include a municipality-wide area or an all-maintenance employee unit of the same geographic scope. It would not serve the interests of sound collective bargaining to have these full-time employees of the respondent treated as either full-time or part-time employees in the bargaining unit of cleaning staff at 2170 Sherobee Road, depending on their job assignments and physical movement, as suggested by the respondent.

8. The Board therefore finds that all employees of the respondent engaged in cleaning at 2170 Sherobee Road, Mississauga, including resident superintendents, save and except property managers, persons above the rank of property managers, office and clerical staff, constitute a unit of employees appropriate for collective bargaining.

9. The Board finds that the applicant is a trade union within the meaning of section 1 (1)(n) of The Labour Relations Act.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 17, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

1595-77-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, (Applicant), v. **Magna-Cote (Division of Magna International Inc.)**, (Respondent).

Re consideration – Procedure – Employer alleging that membership evidence does not reflect wishes of employees because of participation by persons reasonably perceived as managerial – Allegation made at hearing and not previously disclosed – Board declined to entertain allegation –
Quaere: Whether employer may complain of undue influence when no employee affected has done so.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members F.W. Murray and P. J. O’Keeffe.

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER P.J. O’KEEFFE; May 8, 1978.

1. In a decision dated February 23, 1978, the Board exercised its discretion under section 7(2) and certified the applicant. The Board was satisfied on the basis of the membership evidence submitted that more than 55 per cent of the employees in the bargaining unit were members of the trade union and supported its certification as their bargaining agent. In a decision dated February 23rd the Board found that certain unsubstantiated allegations made at the hearing by the respondent employer were untimely and accordingly it refused to entertain them. These allegations were set out in some detail in the Board’s earlier decision. In essence, the employer is claiming that employees were not aware of the character and contents of the documents which they signed or alternatively, that they were improperly or unduly influenced to sign by the participation in the organizational campaign of a person whom the employer now alleges is managerial.

2. In a letter of March 8, 1978 the respondent employer seeks reconsideration of the Board’s decision in this matter and in a letter of March 23rd makes further representations in support of its request. The Board has reviewed the submissions of the respondent as set-out in its letters of March 8th and 23rd and has decided that it should not reconsider its decision of February 23rd.

3. The respondent employer was aware of the involvement in the union's organizing campaign of a person it alleges to be a foreman from as early as January 10th but chose to wait until the hearing to make its allegations. The hearing took place on February 6th. As the Board stated in its initial decision, the failure of the union to record the involvement of the person whom the employer alleges is a foreman on the Form 8 does not constitute a fraud on the Board. As the Board further stated the allegations before it in the instant case are clearly distinguishable from "non-sign, non-pay" allegations which can be made at any time. Such cases involve an allegation that the membership evidence does not meet the statutory requirements although its purports *ex facie* to do so. In this situation the Board will conduct its own investigation and, if a *prima facie* case is uncovered, assume carriage of the subsequent hearing.

4. It is clear that the respondent was required to meet the requirements of rule 47 in so far as it alleged violations of Sections 12 and 61 of the Act. The respondent did not meet these requirements. Whereas the Board has also found that the employer was required to meet the requirements of the rule in so far as its allegation raised a question going to the voluntariness of the membership evidence, the Board does not have to rely on the express provisions of rule 47 to find that the employer's allegation as it related to the voluntariness of the membership evidence was untimely. As the respondent is well aware, an allegation going to the voluntariness of the membership evidence would, in the absence of prior notice, substantially delay the hearing and could ultimately result in the dismissal of the application. Having regard to the nature of the allegation, an employer who is aware of certain "facts" prior to the filing of an application for certification, cannot remain silent upon notice of the application and then, on the basis of these facts, allege at the hearing that membership evidence which meets the statutory requirements of section 1 (1) (j) of the Act, is not voluntary. It is incumbent upon an employer in these circumstances to move promptly upon notice of the application so as not to prejudice the applicant; to do otherwise will cause the Board not to entertain the evidence in support of the allegation.

5. In his written submissions Counsel for the employer has gone to considerable length to impress upon the Board the fact that the employees who are affected by the Board's decision "have an interest which is separate and identifiable from either the employer's interest or the union's interest with respect to their rights under the Labour Relations Act." The Board has consistently recognized this separate and identifiable interest and has consistently granted intervener status to individual employees or groups of employees wishing to take part in certification proceedings. The employees affected by the instant application received proper notice of the proceedings but chose not to appear at the hearing. None of these employees has indicated that he was unaware of the nature of the document which he signed nor have any of these employees complained that they were unduly influenced. None of these employees have seen fit to request re-consideration of the Board's decision to certify the applicant union as their bargaining agent. Rather, it is the employer who seeks reconsideration of the Board's decision. The Board is of the view that employees are best able to represent their own interests according to their own wishes. It is for the employees themselves to request a reconsideration on the grounds that the Board has not given full vent to their rights and desires. (See *re Bargain Hunter Press* (1975) OLRB Rep. Nov. 805 at page 809 and the cases cited therein and *David Barry Company Limited*, unreported, dated September 28, 1976 (Board File No. 0802-76-U).

6. The Board's approach in this regard is consistent with that taken by the Supreme

Court of Canada in the *LRB (Can) v. Transair Ltd. et al* (76 CLLC 14,024), a case in which the Court reinstated a certificate of the Canada Labour Relations Board which had been set aside by the lower court. In that case the Labour Board had rejected an employee petition as untimely and refused to consider it. The Supreme Court stated that if the petition had been taken into consideration the certification order could not have been made. Nevertheless, in setting out an alternative ground upon which to reinstate the certificate, the Chief Justice noted that none of the affected employees had sought the assistance of the court and stated:

“If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is preeminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered *vis-a-vis* a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court.”

7. Having regard to all of the foregoing the Board hereby dismisses the employer's request for reconsideration and reaffirms its initial decision in this matter.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. In the light of all of the circumstances of this case I would have granted a hearing in order to give the respondent an opportunity to adduce evidence with respect to the question of the involvement of the person whom the respondent alleges was a foreman.

3. I am not of the opinion that a charge constituting a fraud on the Board must be the basis for a reconsideration. The Act is quite clear that the Board must satisfy itself as to the true wishes of the employees and accordingly I would have been prepared, in the light of all of the circumstances of this case, to grant a new hearing for the purpose of hearing whatever evidence might be adduced.

1881-77-R Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Applicant), v. **Malen Steel & Salvage Company Limited** (Respondent), v. Labourers' International Union of North America, Local 625, (Intervener #1), v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Intervener #2)

Construction Industry – Certification – Timeliness – Collective Agreement – Whether bar to application – Effect of legislation bringing in province wide bargaining – Effect of statutory termination

of agreements in the I.C.I. sector – Effect on agreement covering both I.C.I. and other sectors – Board held that agreement terminated only with respect to I.C.I. sector.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *W.R. Herridge, Q.C. and John Kamphof for the applicant; Harry Freedman and A.M. Gumpich for the respondent; Thomas Kuttner, Gino Morga and O. D'Agostini for intervenor #1, Al Lefort for intervenor #2.*

DECISION OF THE BOARD; May 23, 1978

1. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
2. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
3. The Board hereby affirms its oral ruling given at the hearing that the respondent company and the Labourers International Union of North America, Local 625 were parties to a collective agreement which came into effect on May 16, 1977 and which, by reason of Section 44(1) of the Act, terminated on May 16, 1978. This collective agreement covers all employees of the respondent "performing work coming within the acknowledged jurisdiction of the union." The agreement, therefore covers employees of the respondent in both the industrial, commercial and institutional sector (ICI) and the other sectors of the construction industry.
4. This application, which is in respect of employees covered by the previous agreement, was filed on March 9, 1978. Having regard to the expiry date of the previous collective agreement (May 16, 1978) and to the stipulation in Section 5(4) of the Act that an application for certification in respect of employees covered by a collective agreement may only be made after the commencement of the last two months of its operation, there is a question as to whether this application is timely. The question of timeliness must be answered in the light of the provisions of section 132(2) of the recently enacted Bill 22; an act to amend the construction industry provisions of the Labour Relations Act.
5. Section 132(2) of Bill 22 reads:

"Notwithstanding subsection 1 of section 44, every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106 and represented by affiliated bargaining agents entered into after the 1st day of January, 1977 and before the 30th day of April, 1978 shall be deemed to expire not later than the 30th day of April, 1978, regardless of any provision respecting its term of operation or its renewal."
6. Both the employer and the applicant union interpret section 132(2) as terminating in total every collective agreement which covers employees employed in the industrial, com-

mercial and institutional sector regardless of whether or not the agreement also covers employees employed in other sectors of the construction industry. If the Board was to accept the interpretation urged by the employer and the applicant the multi sector agreement which is before us would be deemed to terminate in total as of April 30, 1978 and the instant application would be timely in all respects. Intervener #1, on the other hand, argues that Bill 22 deals only with the industrial, commercial and institutional sector and does not in any way address itself to or affect the status quo beyond the industrial, commercial and institutional sector. Intervener #1 interprets section 132(2) as terminating a multi sector agreement only in respect of employees who are employed within the industrial, commercial and institutional sector. It is the position of intervener #1 that a multi sector agreement continues to operate beyond April 30, 1978 in respect of employees employed in other than the industrial, commercial and institutional sector and is unaffected by Bill 22 and in particular by Section 132(2) in so far as it covers employees employed in the other sectors of the construction industry.

7. The Board adopts the interpretation urged by intervener #1. Section 132 must be read in the context of Bill 22 which deals only with the industrial, commercial and institutional sector of the construction industry. Accordingly, the Board reads section 132(2) as terminating a multi sector collective agreement, as is the agreement in this case, only in so far as it covers employees employed in the industrial, commercial and institutional sector. A multi sector agreement would continue to operate beyond April 30, 1978 in so far as it applies to employees employed in other sectors of the construction industry. In the result, the Board finds that the instant application is timely as it pertains to the bargaining rights covering employees of the respondent employed in the industrial, commercial and institutional sector but is untimely as it pertains to the bargaining rights covering employees of the respondent employed in the other sectors of the construction industry.

8. If a trade union seeking to displace an incumbent evidences membership support of not less than forty-five per cent of the employees in the bargaining unit set out in the previous collective agreement, the practice of the Board is to conduct a representation vote among those in the bargaining unit. Because of the effect of section 132(2) this application is timely only in respect of employees in the industrial, commercial and institutional sector. Intervener #1 argues that the Board should find that an industrial, commercial and institutional sector bargaining unit is not appropriate. In support of this position intervener #1 referred to firstly, the practice of the Board not to certify on a sector basis in the construction industry and secondly, the practice of the Board to require an applicant in a displacement situation to take the unit that is in place. Intervener #1 argues that the applicant must take the multi sector unit which is both the appropriate unit and the unit set out in the previous agreement. In the face of the applicant's inability to take this unit because its application is untimely in respect of the other sectors, intervener #1 asks the Board to dismiss the application.

9. The respondent argues that it cannot live with a fragmented situation. It takes the position that because all of its employees were engaged in the industrial, commercial and institutional sector on the day of the application the Board should direct the taking of a vote among all construction labourers in its employ and certify on this basis. The respondent's argument does not take into account the fact that intervener #1 holds bargaining rights for the respondent's employees who are employed in other sectors. Intervener #1 cannot be deprived of these rights other than in accord with the termination provisions of the Act.

10. The effect of Bill 22 is to create a marked difference between the industrial, commercial and institutional sector and the other sectors of the construction industry in respect of both the legal framework and the bargaining structures which now prevail. The Board must recognize these differences and be cognizant of the transition period brought about by the enactment of Bill 22. Without embarking upon a general reassessment of the Board's practices in respect of appropriate bargaining units in the construction industry, it is the view of this panel of the Board that in the circumstances of this displacement application all construction labourers of the respondent performing work coming within the industrial, commercial and institutional sector within the County of Essex, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining. The application is timely in respect of the employees covered by the bargaining unit description set out above.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on March 21, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A representation vote will be taken of the employees in the bargaining unit as of the date of the application who do not voluntarily terminate their employment or who are not discharged for cause prior to the taking of the vote. Neither the applicant union nor intervener #1 challenged the statement of the respondent that the three persons whose names appear on Schedule 'A' were engaged in the industrial, commercial and institutional sector as of the date of application. Voters will be asked to indicate whether they wish to be represented by the applicant or intervener #1 in their employment relations with the respondent.

13. This matter is referred to the Registrar.

1702-77-R Canadian Brotherhood of Railway, Transport and General Workers, (Applicant), v. Norjohn Contracting Limited, (Respondent).

Sale of a Business – Sale of equipment without transfer of good will, customer lists, accounts receivable, or employees held not to be a sale – No continuation of bargaining rights.

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members, W. H. Wightman and O. Hodges.

APPEARANCES: *J. McNamee and R. Beckwith for the applicant; Duncan M. MacFarlane, Q.C., Norris W. Walker and John G. Walker II for the respondent.*

DECISION OF THE BOARD; May 2, 1978

1. This is an application filed under section 55 of The Labour Relations Act alleging

a sale of part of the business of R. E. Law Crushed Stone Limited to the respondent. The applicant seeks a determination that there was a sale of a business within the meaning of section 55 of the Act and that the respondent is bound by the collective agreement by which Law was bound prior to the sale.

2. The dispute in this case arises from a purchase and sale which occurred on or about January 10, 1978 between R. E. Law Crushed Stone Limited and Norjohn Contracting Limited. This transaction is the product of the following series of events. In the latter part of 1977 the business of Law was put up for sale by public tender. Walker Brothers Quarries Limited and Hard-Rock Paving Company Limited were two of several bidders competing to purchase the shares of Law. Norjohn is a corporation associated with Walker Brothers and was not a bidder. In the event that Hard-Rock was the successful bidder, Walker Brothers was interested in Norjohn acquiring certain assets, namely, Law's emulsion plant and some of the allied equipment and supplies. On the other hand, if Walker Brothers was the successful bidder, Hard-Rock wished to acquire Law's asphalt plant. Therefore, the three parties, Walker Brothers Quarries Limited, Hard-Rock Paving Company Limited and Norjohn Contracting Limited executed on December 2, 1977 an agreement for this purpose. Hard-Rock was the successful bidder; purchased the shares of Law and caused the sale to Norjohn of Law's emulsion plant and the allied equipment and supplies as provided in the December 2nd agreement.

3. The applicant, in seeking the declaration from the Board referred to above, holds that many of the factors which the Board uses to assist it to determine whether there is a sale within the meaning of section 55 of the Act are not effective in this case because of certain characteristics of the business in which the vendor and purchaser are engaged. Counsel for the applicant argued, therefore, that particular significance must be given to the elimination of Law as a competitor of Norjohn by virtue of the sale and that what in fact took place was the consolidation of two businesses, not simply the sale of chattels. Counsel for the respondent contends that Norjohn has purchased only certain assets of the business of Law and has purchased nothing of a business as a going concern.

4. Mr. Norris W. Walker, owner of Norjohn Contracting Limited and Walker Brothers Quarries Limited and an officer of Norjohn gave evidence of the transaction which is alleged by the applicant to constitute a sale within the meaning of section 55 of the Act.

5. Norjohn has been in business since 1970. It carries on its business throughout southwestern Ontario from its location in Niagara Falls, Ontario. It began in the paving business and in 1972 it also entered the surface treatment business. In connection with this latter aspect of its business, it operates an emulsion plant in Niagara Falls, the only remaining one in the area although there are five others in Ontario. An emulsion plant blends a mixture of ingredients, the dominant one being asphalt, which, after being sprayed over crushed stone, sets up into a hardened surface. Norjohn's plant is capable of producing 10,000,000 gallons of emulsion in the six months season (April to October). In 1976 its sales were 3,200,000 gallons and in 1977, 2,500,000 gallons. The evidence indicates that the Law plant was about half the capacity of Norjohn's plant. Amongst other competitors' plants there were somelarger than Norjohn's. About twenty per cent of Norjohn's business is in Niagara Falls area and the bulk of its total volume is obtained through public tendering of bids, with only a small portion coming from private customers. This is typical of the industry and Norjohn finds itself tendering in competition usually with four or five other contractors. All of these contractors are engaged in the sale of emulsion or in its sale and application.

6. The sale between Law and Norjohn included, in addition to the emulsion plant, spare parts, graders, rollers and trucks allied to the transportation and application of the emulsion. The evidence before the Board is that Norjohn did not require this equipment for expansion of its business. However, it increased its flexibility to compete for available business by means of increased transportation capacity and by enabling it to supply equipment to certain municipal purchasers of its emulsion who had their own employees to operate the equipment. Certain of Law's emulsion plant and equipment has been dismantled and put into spare parts inventory at Norjohn and it is under commitment to complete the removal of the plant by the end of the year.

7. The transaction does not include any acquisition of customers' lists, accounts receivable or sales contracts and there was no review of any of these by the purchaser. Nor has there been any sales campaign by Norjohn to acquire the private customers of Law. The rights to the name PAVCO, by which Law's emulsion was known, remained with Law. No rights to its use were obtained by Norjohn and there was no agreement restricting Law from competing with the respondent in the surface treatment business, nor did the December 2nd agreement contain any undertaking by Hard-Rock not to compete in this business. There was no sale or transfer of goodwill, either implicitly or explicitly.

8. Norjohn did not acquire any employees from Law and had no discussions with the vendor regarding any intention to hire employees. The employee who operated the plant for the vendor is still employed by Law. Furthermore, the evidence is that the respondent's manning is adequate for its expected business volume. Norjohn does not have any plans to expand its surface treatment business, but considers itself to be in a more flexible position to benefit from any improvement in the total volume available in the industry.

9. The agreement between Walker Brothers, Hard-Rock and Norjohn provides an option by which Hard-Rock, if Walker Brothers was the successful bidder, could enter into a lease with Law to continue to operate the asphalt plant on Law's property for a term of five years at an annual rental of \$200.00. Hard-Rock would also buy at a preferred price from Walker Brothers all of its stone requirements for inside asphalt plant use, to be supplied from a quarry on the property on which the plant is located. Norjohn acquired a collateral option from Hard-Rock in respect to continuing to operate the emulsion plant on the property if Hard-Rock was the eventual purchaser of Law's shares, but without any buy/-sell arrangement regarding materials. Under each lease option the lessee had the right to remove the buildings and equipment of its plant during the term of the lease without further liability for payments under the lease. As indicated at the end of paragraph 6, Norjohn chose not to exercise its option to operate the plant on Law's property as it stood, and has already partially dismantled its plant.

10. There is no evidence of other covenants or undertakings of any kind in respect to the sale from Law to Norjohn and the evidence is that there are no other documents in respect to the sale other than those filed with the respondent's reply and in exhibit at the hearing.

11. Section 55 of The Labour Relations Act provides that where a business or part thereof is sold, leased, transferred or otherwise disposed of, the purchaser as successor employer is subject to the collective bargaining obligations of the vendor in respect of the business which has changed hands. The two-fold purpose of the section is to prevent an under-

mining of bargaining rights and to provide a degree of permanence for establishing bargaining rights. The Board has reasoned that, if this dual purpose is to be met, the rights of a union as bargaining agent of employees of a business must be vested in that business. See *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733 at p. 735 wherein the Board states:

Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

The critical question to be answered in that case was whether there was a continuation of the vendor's business and that is the test to be met in each case when determining whether there has been a section 55 disposition. To find the answer to that question, the Board looks beyond the outward legal form of the transaction to examine it in its entirety. To assist it in this task it has considered numerous factors, many of which are outlined and their use assessed in paragraph 16 of *Culverhouse Foods Limited, and Culverhouse Foods Incorporated*, [1976] OLRB Rep. Nov. 691 at p.698:

... a countless variety of factors ... might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it is [sic] was before, i.e. whether there has been a continuation of the business.

12. Reference was made at the outset of this decision to applicant's argument that certain characteristics of the two businesses involved in the transaction at hand render ineffective some of the criteria considered by the Board in section 55 cases. These characteristics are: purchaser and vendor are in identical businesses; the bulk of their business volume

is obtained by competitive bidding, so they often sold to the same customers and were knowledgeable of each others customers; the private customers of each were few in number; and the purchaser had substantial surplus plant capacity. Counsel for the applicant holds that these circumstances render ineffective such criteria as customer lists, accounts receivable, sales campaigns to capture the vendor's customers, examination of customer accounts, existing sales contracts and covenants not to compete, all of which in the applicant's view should cause the Board to accept the extrinsic evidence suggested by Norjohn's option to operate the emulsion plant on Law's property as proof that Norjohn is trying to gain more than chattels; that it intends to expand into the gap left by the sale of Law and, therefore, that a consolidation of two businesses has taken place.

13. The Board would have to deny virtually all of the facts before it if it were to allow the applicant's argument, particularly the evidence that there has been no transfer of employees to Norjohn or any intermingling of employees of the vendor and purchaser and there is no evidence that any of Law's employees have been laid off because of the sale. While the purchase by Norjohn of Law's emulsion plant may have had the result of eliminating one of its competitors, it can just as well be inferred from the evidence that Norjohn acted to protect itself from having the assets acquired by one of its competitors, although there is no evidence to identify the other bidders for Law's shares. If Norjohn has been successful by means of this transaction in protecting its market in this manner, this still is not proof of a continuation of Law's business under Norjohn's ownership. In any event, the evidence is that there are always four or five bidders for the jobs on which Norjohn tenders. Furthermore, the applicant was unable to explain to the Board what would be the effect on Law's employees if it should allow its application. It did say that when the collective agreement expired it would be able to serve notice upon Norjohn to bargain collectively. If this were to take place, the union would then be in a position to bargain for Norjohn's employees, none of whom were employees for whom the union had collective bargaining rights at the date of sale.

14. The facts in this matter speak for themselves, clearly establishing that the business of Law did not continue to operate after the sale to Norjohn and that this is not the kind of disposition in respect of which section 55 of the Act is intended to preserve bargaining rights.

15. The Board's decision is, therefore, that there has not been a sale of a business of R. E. Law Crushed Stone Limited to Norjohn Contracting Limited within the meaning of section 55 of the Act and that Norjohn is not bound by the collective agreement between the applicant and Law.

1841-77-R Canadian Paperworkers' Union, (Applicant), v. The Ontario Paper Company Limited, (Respondent), v. The Canadian Union of Operating Engineers and General Workers, (Intervener).

Representation Vote – Charges – Effect of alleged breach of silent period – Failure to take reasonable steps to remove propaganda material from bulletin board held to be a breach justifying holding of a new vote.

BEFORE: Rory F.Egan, Alternate Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Gary Buccella, Don Holder, William Hager and Gord Gibson for the applicant; no one for the respondent; Larry Haiven and Ken Brown for the intervener.*

DECISION OF THE BOARD; May 16, 1978.

1. In a decision dated March 23, 1978, the Board directed the taking of a pre-hearing representation vote of employees of the respondent in a voting constituency comprising all stationary engineers and persons primarily engaged as their helpers in the steam plant of the respondent at Thorold, with exceptions not here relevant.

2. Subsequent to the holding of the representation vote, the intervener filed an objection in which it alleged that the applicant had broken the "silent period" set by the Registrar pursuant to Rule 43 of the Rules of Procedure. The silent period commenced at midnight on Sunday, April 2, 1978. The vote was held on April 6, 1978.

3. The intervener's complaint is that three documents issued by the applicant were displayed on the notice board in full view of all potential voters throughout the silent period.

4. There was no dispute that the documents constitute propaganda with respect to the application and vote. There is also uncontradicted evidence that the documents were left on the notice board throughout the silent period as alleged by the intervener. There was no evidence as to who had placed the documents on the bulletin boards.

5. One of the documents which bears the title

"We can do better together ...

Join the CPU"

was introduced into the plant by Gordon Gibson, a stationary engineer, on Sunday, April 2nd, and was distributed there by him. He stated that it was 11:20 p.m. when he ceased handing out the pamphlets. He said that he had been instructed by William Hager to deliver the bulletins to employees before midnight because of the 72-hour silent period. He did not post the bulletin on the notice board.

6. William Hager, who is the shift engineer and was Chairman of the Stewards Committee of the intervener, was involved in the campaign on behalf of the applicant. He told the Board that he had delivered the pamphlets to Gibson at the request of the applicant union. He said his instructions from the CPU were to be sure to observe the silent period in distributing the pamphlets. He said he discussed the silent period with Gary Buccella, the representative of the applicant union. He was told when the silent period was to start and that he was to observe silence and not to touch anything that had been posted or discuss with anyone how they should vote. Buccella told the Board that Hager was coached with respect to the silent period.

7. There is no doubt that proper instructions were given to the in-plant organizers with respect to the silent period, at least insofar as the distribution of the pamphlets is concerned and that these instructions were specifically observed by Gibson. The intervener pointed out that although the distribution of the pamphlets had ceased before the period of limitation began, there was a whole new shift which commenced work on the Tuesday evening following the distribution who had not seen the pamphlets, and who might have been influenced by copies that had been left around by the employees to whom they had been distributed.

8. The Board has said that there is a heavy onus on the parties concerned to see that the prohibition against propaganda is observed. The prohibition is not absolute. It does not mean that any infraction will result in the invalidation of the vote and the fact that employees may have been careless or untidy in the manner in which they disposed of propaganda documents properly issued cannot be said to be conduct within the reasonable control of the parties concerned so as to invalidate a vote.

9. Of significance, however, is the fact that the bulletin was displayed on the notice board during the silent period and while the voting was in progress. The fact that it was a new piece of propaganda, insofar as the people who came on shift on Tuesday evening is concerned, would render it more attractive, to them at least, than the notices which had been posted for some time. Furthermore, this bulletin contained wholly inaccurate and misleading information with respect to the application of section 6 of The Labour Relations Act.

10. There can be no doubt that the applicant, who was not only supported by Hager and Gibson, stewards of the rival intervener, but which was also in contact with members of its own Local which represents people in the plant, was aware that the notices had been posted. Not only did it fail to take reasonable steps to instruct Hager to see that all its propaganda was removed from the Board but it, according to his evidence, instructed him not to remove anything from the bulletin boards.

11. In the result, we find that the applicant has failed to discharge onus arising out of the prohibition against the use of propaganda during the silent period imposed by the Registrar under Rule 43.

12. The Board accordingly directs that the result of the vote taken on April 6, 1978 be set aside and that a new pre-hearing representation vote be taken of the employees in the voting constituency described in paragraph 4 of the Board's decision dated March 23, 1978.

13. Those eligible to vote will be all employees of the respondent in the voting constituency on the 15th day March, 1978, who have not voluntarily terminated their employment or who have not been discharged for cause between the 15th day of March, 1978, and the date the vote is taken.

14. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

15. The matter is referred to the Registrar.

1980-77-R and 0036-78-R Owen Sound General and Marine Hospital, (Applicant), v. Ontario Public Service Employees Union; Canadian Union of Public Employees, Local 48; and Ontario Nurses' Association and its Local 147, (Respondents).

Sale of a Business – Bargaining Unit – Transfer of undertaking from the Crown to the private sector – Intermingling of employees and need to reconcile preexisting bargaining rights – Private sector bargaining structure more fragmented than existing all inclusive public sector unit – Board ordered representation votes using private sector units as the basis for the voting constituencies

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and E.C. Went.

APPEARANCES: *Janice A. Baker, Allan McIntosh, Ronald T. Sapsford and W. Ray McCallum for Owen Sound General and Marine Hospital; Chris G. Paliare and James Best for Ontario Public Service Employees Union; Mario Hikl, George Wilson and David Howell for Canadian Union of Public Employees Local 48; Donald F.O. Hersey and Miss K. Lewis for Ontario Nurses' Association.*

DECISION OF THE BOARD:

1. These are two applications brought under section 4 of *The Successor Rights (Crown Transfers) Act, 1977*. Both applications deal with a transfer of an undertaking from the Crown to an employer governed by the provisions of the *Labour Relations Act*. This is the first occasion on which the Board has dealt with this kind of transfer, presenting the complex problem of reconciling pre-existing bargaining rights where an undertaking has been divested by the Crown. Both applications arise out of the same set of facts and they will be dealt with together.

2. At the outset of the hearing the intervener Ontario Public Service Employees Union objected to both applications on the ground that they were untimely. The basis of this objection was that the transfer in question was not fully completed until a date following the filing of either application. Counsel for the intervener, however, admitted that the transfer had been fully consummated by the time of the hearing of the two applications. Moreover, it was also clear that all interested parties had been given reasonable notice of the hearing and the issues to be dealt with at the hearing. In these circumstances, the Board ruled that the hearing should proceed. In the Board's view no breach of the rules of natural justice or jurisdictional error would result from treating the two applications as speaking from after the completion of the transfer, and to adjourn would simply delay the hearing of these two applications because of a mere technicality. The Board, therefore, dismissed the preliminary objection.

3. The two applications arose out of a transfer of the Dr. MacKinnon Phillips Hospital to the Owen Sound General and Marine Hospital. The former institution is a psychiatric hospital which, prior to the transfer, was owned and operated by the Crown in Right of Ontario. The Owen Sound General and Marine Hospital is a general treatment hospital incorporated under the laws of the Province and governed by a board of directors. For ease of reference the Dr. MacKinnon Phillips Hospital will be referred to as the psychiatric hospital

and the Owen Sound General and Marine Hospital will be referred to as the general hospital.

4. The two hospitals are located some four miles apart, the general hospital being situated in Owen Sound and the psychiatric hospital in the Township of Sydenham. For approximately a year prior to the transfer, the psychiatric hospital shared a part of its facilities with the general hospital, leasing to the general hospital a ward (Ward F) which the general hospital used as an extended care unit for the care and treatment of some 34 patients. This arrangement, however, was merely an interim measure to resolve the general hospital's problem of overcrowding.

5. The long-term solution worked out by the Ministry of Health and the general hospital was a merger of the psychiatric hospital and the general hospital into one institution to be owned and operated by the general hospital. The first stages of the merger commenced on April 1, 1978 when the land and chattels of the psychiatric hospital were transferred to the general hospital. At that time all patients on the rolls of the psychiatric hospital were transferred to the rolls of the general hospital, as were their medical records. Prior to April 1, letters had been sent to all person employed at the psychiatric hospital offering employment with the general hospital effective from that date. Bargaining unit employees at the psychiatric hospital were offered terms of employment and benefits in accordance with the existing collective agreements for the period proceeding a determination by this Board on the allocation of bargaining rights. Apparently most of these employees agreed to accept employment with the general hospital.

6. The merger, according to the present plan, will result ultimately in one institution located at the site of the former psychiatric hospital in Sydenham Township. At the present time, however, the merged institution is operating at both the Owen Sound and Sydenham Township locations while the physical merger is completed in stages. A renovation to the former psychiatric hospital is about to be undertaken and, later, an active treatment wing will be added to that facility. It is planned that some patients will be transferred from the Owen Sound location to the Sydenham Township location upon the completion of the renovations, and that all patients will be transferred to this location when the new wing is built.

7. A consolidation of the operations of the psychiatric hospital and the general hospital was set in motion as of April 1st. Although this consolidation is far from complete, there is now one administrative structure for the merged institution and some intermingling of employees has taken place. At the present time 90 employees (not all bargaining unit members) out of the 922 persons employed by the merged institution have either been transferred or rotated so that employees who worked for what were formerly separate institutions are now working alongside one another. The evidence indicated that the intermingling of employees will increase as the consolidation of the two operations continues.

8. As the result of the intermingling there are now employees working alongside each other and performing the same work who are subject to different terms and conditions of employment. This situation is the result of the different collective bargaining structure that the merged institution inherited from the psychiatric hospital. When the psychiatric hospital was owned and operated by the Crown, the employees were part of the bargaining structure established under *The Crown Employees Collective Bargaining Act, 1972*. This structure is remarkable for its comprehensiveness, providing a province-wide, all-employee

unit for public servants. At the time of the merger, OPSEU held bargaining rights for all persons at the psychiatric hospital who would be regarded as employees under *The Crown Employees Collective Bargaining Act* as a part of their province-wide bargaining unit of public servants. It was established that this part of the OPSEU province-wide unit was comprised of 207 employees, 114 of them being service employees and 30 of them being nurses.

9. A quite different bargaining structure exists at the general hospital. The bargaining units established there follow the pattern established for general hospitals across the Province. The Canadian Union of Public Employees, Local 48 (CUPE) holds bargaining rights for a bargaining unit of full-time service employees, defined in the following terms in the scope clause of its latest collective agreement.

2.01 The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all of its employees save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, school students, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, medical social workers, clerical workers, ward clerks and persons regularly employed for not more than twenty-four hours per week. For the purpose of clarity, the term technical personnel comprises physiotherapists, occupational therapists, psychologists, electroencephalographists, electric shock therapists, laboratory, radiological, nuclear medicine, pathological, respiratory technology and cardiology technicians.

Apparently 176 employees were included in this bargaining unit. Two other bargaining units have been established at the general hospital. The Ontario Nurses' Association (ONA) holds bargaining rights for two units of registered and graduate nurses, one a unit of 123 full-time nurses and the other a unit of 128 part-time nurses. The two recognition clauses in the latest collective agreements describe these units in terms of nurses "engaged in nursing care in the hospital". The remainder of the employees at the general hospital were not covered by a collective agreement.

10. On the facts the Board finds that there has been a transfer, as defined in section 1(1)(f) of *The Successor Rights (Crown Transfers) Act, 1977*, from the Crown to the Owen Sound General and Marine Hospital (hereinafter referred to as the hospital). Accordingly, we hold that Owen Sound General and Marine Hospital is now bound by the collective agreement between the Crown and the Ontario Public Service Employees Union in respect of those employees employed in the undertaking that has been transferred. It should be made clear, however, that the hospital is bound by this collective agreement only until the Board defines the appropriate bargaining structure and determines which trade unions shall be the bargaining agents.

11. The difficult task facing this Board is to delineate the appropriate bargaining units and to determine which of the competing bargaining agents, if any, should represent the employees in these bargaining units. The hospital submits that the somewhat parallel bargaining structures now existing should be eliminated and that there should be one bargaining structure for employees at both locations corresponding to the general structure of hospital bargaining units in Ontario. More specifically, the hospital asked that the Board es-

establish a full-time nurses unit, a part-time nurses unit, a full-time service unit, a part-time service unit, a full-time office and clerical unit and a part-time office and clerical unit, a full-time unit of para-medical employees, and a part-time unit of para-medical employees, all of these units covering the employees at both locations. In addition, the hospital requested that the Board exercise its power under section 8 of *The Successor Rights (Crown Transfers) Act, 1977* to order a representation vote for those bargaining units containing employees who were not represented by any union prior to the transfer.

12. The Canadian Union of Public Employees, Local 48, has asked the Board to declare, without taking a vote, that the service employees at the two locations fall within a single bargaining unit for which it is a bargaining agent. The effect of such a declaration would be to include 114 of the employees now represented by OPSEU within the CUPE bargaining unit. In support of this approach, CUPE argued that the scope clause in its latest collective agreement was sufficiently broad to establish an entitlement to represent the service employees formerly employed by the Crown.

13. The Ontario Nurses' Association argued that an intermingling of employees had taken place, giving the Board a jurisdiction under section 5 of *The Successor Rights (Crown Transfers) Act, 1977* to redefine the bargaining structure. The appropriate structure, according to counsel, was the structure that now existed in the hospital sector. Counsel submitted that the Board should define a full-time unit of nurses and a part-time unit of nurses covering nurses at both the Owen Sound location and the Township of Sydenham location. Further, it was submitted that the Board should declare, without the taking of a vote, that the ONA be the bargaining agent for each of these bargaining units.

14. The Ontario Public Service Employees Union argued that the parallel bargaining structures existing at the two locations be maintained and sought a declaration from the Board declaring that all employees now represented by OPSEU at the Sydenham Township location constituted an appropriate bargaining unit and that OPSEU be the bargaining agent for this bargaining unit. The submission of OPSEU was based on the premises that there did not exist any conflict of bargaining rights, nor was there sufficient intermingling of employees following the transfer of the undertaking to justify a redefinition of the bargaining structure. Counsel argued that the Board should preserve OPSEU's existing bargaining rights by taking into account the geographical separation of the two hospital facilities.

15. The Board does not agree with either of the two premises underlying OPSEU's submissions. The scope or recognition clauses in the CUPE collective agreement and the ONE collective agreements are not expressly restricted to a single geographic location. The CUPE clause simply refers to the employees of the hospital, while the ONA clauses refer to nurses engaged in nursing care in the hospital. Moreover, past dealings between these unions and the hospital indicate that these scope clauses were treated as covering certain employees at Ward F at the Township of Sydenham location prior to the transfer. Now, as the result of the transfer, the Owen Sound General and Marine Hospital operates all of the facility at this location as well as operating the Owen Sound facility. Both CUPE and ONA, therefore, can claim that the transfer which took place has caused an accretion of their bargaining units. The bargaining rights of OPSEU for certain employees at the Sydenham Township location, however, still exist, having been continued by section 2(1) of *The Successor Rights (Crown Transfers) Act, 1977*. There is no question, then, that there exists a conflict of bargaining rights as contemplated by section 4(1)(b) of *The Successor Rights*

(*Crown Transfers*) Act, 1977, permitting the Board to exercise its jurisdiction under section 4(1)(d) of that statute.

16. Not only does there exist a conflict of bargaining rights, but the transfer of the undertaking has resulted in a sufficient intermingling of persons employed by the psychiatric hospital before the transfer with persons employed by the hospital to justify an exercise of our jurisdiction under section 5(1) of *The Successor Rights (Crown Transfers) Act, 1977*. The fact is that the first stages of a consolidation of the psychiatric hospital and the general hospital have taken place resulting in some interchange of employees between the two facilities. There is no question that this consolidation will continue, culminating in a physical merger of the two facilities at the Township of Sydenham site with a full range of medical and psychiatric services offered at this one location. Given this situation, there is a need to redefine the appropriate bargaining structure for the expanded institution.

17. What then is the appropriate bargaining structure for the hospital? Counsel for OPSEU submitted that the degree of intermingling was not sufficient to justify a disturbance of the bargaining rights held by OPSEU, and that the primary consideration should be the geographical separation of the two facilities. *Oshawa Wholesale Ltd.*, [1965] OLRB Rep. Feb. 584 and *Mammy's Wonder Bakeries*, [1969] OLRB Rep. Mar. 1324, among other authorities, were cited as supporting this approach. The question is whether these authorities, relating to the successor rights provision in the *Labour Relations Act*, are of much guidance when dealing with the unique problem now before us.

18. In this case we have an undertaking being moved from the government sector to what might be called the quasi-public sector. The Crown has relinquished its role of employer and has given it to a public hospital board. Of even more significance is the fact that the collective bargaining structures existing in the two sectors are completely different. It should not be surprising, therefore, that the provisions of *The Successor Rights (Crown Transfers) Act, 1977* contain no reference to "the like bargaining unit" as does section 55 of the *Labour Relations Act*. Where transfer between sectors occurs there can be no presumption, such as was made in *Oshawa Wholesale Ltd.*, *supra*, that existing bargaining units will continue in their same form. In the Board's view, the presumption is the opposite – that existing bargaining units must be adapted to fit the bargaining structure of the sector that they have just entered. To take the other approach would be to create an anomalous and unwieldy bargaining structure that would defy all common sense.

19. The degree of intermingling in this case, in the Board's view, is a significant factor. Already employees are working alongside one another doing the same job but subject to different terms and conditions of employment. This interchange of employees has not been confined to a particular geographic location, as was the case in *Mammy's Wonder Bakeries*, *supra*, but has occurred between the two facilities. Moreover, it is also evident that the degree of interchange between facilities will increase, culminating in all employees working at one location. In these circumstances, the Board does not consider that a geographic separation of bargaining units should be maintained. The Board, therefore, considers that the appropriate bargaining structure is one corresponding to the pattern existing in other general hospitals in the Province and that this structure should be established without any geographic distinction being made between the two facilities operated by the hospital.

20. The Board's next task is to determine which of the competing trade unions should

be the bargaining agent for these bargaining units. It was submitted by CUPE that it had the better claim to represent the service unit, and no vote should be held. Likewise, ONA submitted that it had the better claim to the two nurses bargaining units, dispensing with the need for any vote. Counsel for ONA argued that it held bargaining rights for 261 of the 291 nurses working at the two facilities and, therefore, the Board should not direct a representation vote. For the Board's guidance counsel cited *Alliance Dairy*, [1966] OLRB Aug. 337 and *Borough of Etobicoke*, [1967] OLRB Mar. 1001, cases dealing with the exercise of the Board's discretion under the successor rights provision of the *Labour Relations Act*. These authorities, in our view, are of limited value when dealing with a transfer between sectors such as occurred in this case. This kind of transfer makes it more difficult to compare the relative support enjoyed by bargaining agents simply because we cannot compare like bargaining units. The fact is that, prior to the transfer, OPSEU represented a substantial number of employees at the psychiatric hospital, among them service employees and nurses, who were included in its comprehensive, province-wide bargaining unit. A vote, in our view, is the fairest method of determining which of the competing unions should act as bargaining agent. Moreover, given the fact that not all employees of the hospital are now represented by a trade union, we consider that a vote should take place in all the bargaining units that the Board now considers to be appropriate.

21. The Board finds that all employees of the Owen Sound General and Marine Hospital, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, school students, technical personnel, supervisors, person above the rank of supervisor, chief engineer, medical social workers, clerical workers, ward clerks and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the hospital appropriate for collective bargaining. For the purpose of clarity, the term technical personnel comprises physiotherapists, occupational therapists, psychologists, electroencephalographists, electric shock therapists, laboratory, radiological, nuclear medicine, pathological, respiratory technology and cardiology technicians. This bargaining unit will be hereinafter referred to as bargaining unit #1.

22. A representation vote will be taken of the employees of the hospital in bargaining unit #1. All employees of the hospital in bargaining unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

23. Voters will be asked to indicate whether or not they wish to be represented by the Canadian Union of Public Employees, Local 48, or the Ontario Public Service Employees Union.

24. The Board finds that all employees of the Owen Sound General and Marine Hospital regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, medical social workers, clerical workers, ward clerks, constitute a unit of employees of the hospital appropriate for collective bargaining. For the purpose of clarity, the term technical personnel comprises physiotherapists, occupational therapists, psychologists, electroencephalographists, electric shock therapists, laboratory, radiological, nuclear medicine,

pathological, respiratory technology and cardiology technicians. This bargaining unit will hereinafter be referred to as bargaining unit #2.

25. A representation vote will be taken of the employees of the hospital in bargaining unit #2. All employees of the hospital in bargaining unit #2 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

26. Voters will be asked to indicate whether or not they wish to be represented by the Ontario Public Service Employees Union.

27. The Board finds that all full-time registered and graduate nurses engaged in nursing care in the Owen Sound General and Marine Hospital, save and except Head Nurses and persons above the rank of Head Nurse constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #3.

28. A representation vote will be taken of the employees of the hospital in bargaining unit #3. All employees of the hospital in bargaining unit #3 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

29. Voters will be asked to indicate whether or not they wish to be represented by the Ontario Nurses' Association, Local 147, or the Ontario Public Service Employees Union.

30. The Board finds that all registered and graduate nurses engaged in nursing care in the Owen Sound General and Marine Hospital who work less than five tours per week on a regular basis, save and except Head Nurses and persons above the rank of Head Nurse, constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #4.

31. A representation vote will be taken of the employees of the hospital in bargaining unit #4. All employees of the hospital in bargaining unit #4 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

32. Voters will be asked to indicate whether or not they wish to be represented by the Ontario Public Service Employees Union.

33. The Board finds that all paramedical employees of the hospital, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #7.

34. A representation vote will be taken of the employees of the hospital in bargaining unit #5. All employees of the hospital in bargaining unit #5 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

35. Voters will be asked to indicate whether they wish to be represented by the Ontario Public Service Employees Union.

36. The Board finds that all paramedical employees of the hospital regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #6.

37. A representation vote will be taken of the employees of the hospital in bargaining unit #6. All employees of the hospital in bargaining unit #5 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

38. Voters will be asked to indicate whether they wish to be represented by the Ontario Public Service Employees Union.

39. The Board finds that all office and clerical employees of the hospital, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #7.

40. A representation vote will be taken of the employees of the hospital in bargaining unit #7. All employees of the hospital in bargaining unit #7 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

41. Voters will be asked to indicate whether they wish to be represented by the Ontario Public Service Employees Union.

42. The Board finds that all office and clerical employees of the hospital regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations, constitute a unit of employees of the hospital appropriate for collective bargaining. This bargaining unit will hereinafter be referred to as bargaining unit #8.

43. A representation vote will be taken of the employees of the hospital in bargaining unit #8. All employees of the hospital in bargaining unit #8 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

44. Voters will be asked to indicate whether they wish to be represented by the Ontario Public Service Employees Union.

0128-78-R Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C., (Applicant), v. Paris Poultry Products Limited, (Respondent).

Certification – Bargaining Unit – Where the hours of work of all employees were subject to continuous fluctuation, the Board declined to make a distinction between “full time” and “part time” employees, and granted an all inclusive unit

BEFORE: E. Norris Davis, Vice-Chairman and Board Members M. J. Fenwick and C. G. Bourne.

APPEARANCES: *Vincent Gentile for the applicant; Douglas C. Ainsworth and Bernard Derschorr for the respondent.*

DECISION OF THE BOARD; May 15, 1978

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The applicant, which applied for a unit of all employees except for (amongst other exclusions) “employees working 24 hours or less”, asked leave at the hearing to amend its application so as to include in the unit employees working 24 hours or less.
3. The respondent objected to the amendment sought and made representations that the applicant should be held to its initial proposal. The Board is of the view that amendments to the unit claimed may be made at the hearing of an application for demonstrated reasons, inasmuch as the determination of the appropriate bargaining unit is the function of the Board and remains in issue until such determination.
4. The respondent has been engaged for some two years in the poultry business and despite an existing adverse economic environment has succeeded in expanding the business from one employing 3 or 4 employees two years ago, to one now employing 30-32 employees. The financial condition of the business is improving and the respondent’s judgment is that within a few months the business will be sound and with established expanded markets.
5. In the meantime, it must be noted, that work is scheduled solely to meet business demands with the result that the week preceding the hearing was the only week in two years in which employees worked a full work week and the week preceding that the average work week was 12 ½ hours. The organization of work is such that when work is scheduled some 30-32 employees are required to efficiently man the operation.
6. The respondent states that all persons are hired on the understanding that they will work when work is available: and further that all people hired know it is part-time and may be 2, 3 or 4 days in a week.
7. In filing the required lists of employees, the respondent in an endeavour to meet the unit claimed by the applicant (in respect to the distinction between full-time and part-

time employees) averaged the actual hours of work by each individual employee over the period of March 6, 1978 to April 14, 1978 and points out that had the averaging period been extended to include up to April 21, 1978, the resulting averages would have been considerably less. In any event this approach resulted in 15 employees being placed on Schedule A as having worked 24 hours or more and 17 employees being placed on Schedule B as having worked less than 24 hours.

8. In respect to those included on Schedule A, no employees (other than two truck drivers who worked 31.6 and 37.9 hours respectively) worked in excess of 29 hours. In respect to those included on Schedule B, all employees (except for 4 employees) worked in excess of 20 hours and up to 23.5 hours.

9. The Board's policy is to exclude part-time employees from an all employee unit on the request of either party, provided there is a past history of use of such employees. This policy is based on a difference in the community of interest which exists in respect of full-time employees and to part-time employees. In the present case, there is no suggestion that in the employment relationship there is an identifiable group of employees hired to work part-time and another group hired to work full-time. The representations are that all persons are hired to work as required and that the probabilities (based on past experience) are that the hours required to work will be less than a full week and will fluctuate from week to week.

10. In our view all of the persons employed (whether they appear on Schedule A or Schedule B of the employer's lists) have the same hours of work and working conditions and their interests in these topics are identical. They have the same community of interest and should be included in a single bargaining unit. The peculiar circumstances under which this employer has been forced to operate, make any distinction between persons regularly working 24 hours or less and persons regularly working full-time of no significance in determining the appropriate bargaining unit.

11. The Board finds that all employees of the respondent at Paris, Ontario save and except for supervisors, forewomen and persons above the rank of supervisor and forewoman, office and sales staff and students hired during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 28, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

1857-77-U Bakery & Confectionery Workers' International Union of America, Local 264, (Complainant), v. Sandra Instant Coffee Company Limited, (Respondent).

S79 – Duty to Bargain in Good Faith – Failure to transform proposed memorandum of agreement into finalized collective agreement – parties not ad idem – bona fide disagreement as to meaning and import of memorandum – no bargaining in bad faith

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members W. H. Wightman and E. Boyer.

APPEARANCES: *E. G. Posen and John Miller for the complainant; A. A. White, G. R. Ingram and P. Higgins for the respondent.*

DECISION OF THE BOARD; May 8, 1978

1. This is a complaint brought under section 79 of The Labour Relations Act in which the complainant alleges that the respondent has dealt with it contrary to the provisions of section 14 of the Act.

2. Section 14 provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

3. The complainant requests that the Board issue a declaration that a collective agreement between the complainant and the respondent is in full force and effect or, alternatively, that the Board issue a direction to the respondent to execute a collective agreement with the complainant.

4. The respondent takes the position that a collective agreement, properly executed by the company and in agreement with the Memorandum of Agreement, was submitted to the union on December 15, 1977 and was subsequently returned to the company with revisions not in keeping with the agreements during negotiations.

5. The complainant was certified as the bargaining agent for employees of the respondent on November 4, 1976.

6. Notice to bargain by the complainant was forwarded to the respondent in due course and from in or about the month of December 1976 until in or about the month of June 1977, the complainant and the respondent conducted negotiations with a view to making a collective agreement.

7. On or about the 17th day of June, 1977, the complainant engaged in a lawful strike of the respondent at the respondent's premises in Ajax, Ontario, which strike lasted until the 8th day of November, 1977, at which time the parties, through their duly appointed representatives, entered into a Memorandum of Agreement purporting to settle all outstanding issues between the complainant and the respondent.

8. The parties signed a handwritten Memorandum of Agreement dated November 8, 1977, the terms of which are as follows:

The parties agree to recommend to their principals without reservation, as a settlement of all matters in dispute the provisions of Exhibit B as amended by Exhibit A, both of which are attached hereto.

9. Exhibit "B" is a draft of a proposed collective agreement between the parties. Exhibit "A", as is indicated, contains proposed alterations to clauses and the addition of clauses to those set out in Exhibit "B".

10. It should be noted that Exhibit "B" to the Memorandum contains 23 Articles, the last of which reads as follows:

Article 23 – Rates of Pay

23.01 Attached hereto and forming part of this agreement is Schedule "A" which fixes the minimum rates to be paid by the Company during the lifetime of this agreement.

No Schedule "A", however, was attached to Exhibit "B" nor to any other part of the Memorandum.

11. The Memorandum of Agreement was ratified by the union on November 9, 1977.

12. The union notified the company that the Memorandum had been ratified and requested the company to sign an Agreement and send it to the union for the latter's signature. After some time during which the union kept pressure on the company to send the Agreement, the company, sometime in December, delivered an executed Agreement to the union. It bears the date of December 15, 1977.

13. This Agreement contained an Article 24 in the following form:

ARTICLE 24 – RATES OF PAY

24.01 Attached hereto and forming part of this agreement is Schedule "A" which fixes the minimum rates to be paid by the Company during the lifetime of this agreement.

That is the precise wording of Article 23.01 of Exhibit "B" to the Memorandum to which we have previously referred.

14. The company stated at the hearing that in an attempt to conform to the provisions of Article 24 of the newly-drafted Agreement (Article 23 of the earlier draft), it had attached to the signed document it had sent to the union a Schedule "A" listing categories of employees and their rates effective November 9th, 1977 and November 9th, 1978. The list of categories is repeated under each of the effective dates, so that each appears twice in the Schedule.

15. The parties had used a list of categories during the negotiations. That list had

shown a category called "Quality Control" and categories of "Operator 1" and "Operator 2". The list did not contain an Operator III category.

16. The list set out in Schedule "A" attached to the document which the company had executed did not contain the Quality Control category, but did set out the category of Operator III.

17. The union returned the document to the company under cover of the following letter:

February 22, 1978

DELIVERED BY HAND

Sandra Instant Coffee Company Limited,
Head Office,
2550 Stanfield Road;
Mississauga, Ontario.
L4Y 1S4

Attention: G. R. Ingram, Vice-President, Finance

Dear Sir:

Re: Local 264, Bakery & Confectionery Workers and
Sandra Instant Coffee, Ajax, Ontario

I am the solicitor for the Union in this matter.

My clients have brought to me a draft collective agreement which you forwarded to Mr. Zimmerman on December 15, 1977.

Schedule "A" which you have handed to my clients and signed by Mr. Ingram, does not comply with the classifications negotiated between the parties.

Accordingly, I have deleted the category "Operator III" and added the category "Quality Control".

My clients have now initialled Schedule "A" as amended and signed the collective Agreement on behalf of the bargaining agent.

Please note paragraph 3.01 has also been amended and requires the Company's initials.

Please ensure that 3 signed copies of this agreement are returned to my client as amended within 5 days of the date of this letter.

Yours truly,

Elliott G. Posen

EGP/gc
Enclosures
cc Local 264

18. The Schedule "A" attached to the proposed Agreement as filed with the Board does, as indicated in the solicitor's letter, show the deletions and additions duly initialled by the union.

19. Paragraph 3.01 which is also referred to in the solicitor's letter, deals with the authorization of union dues. The Memorandum of Agreement states under the heading of Article 3 - Union Security, "the Company will recognize only those dues deduction authorization forms signed subsequent to the ratification of the Agreement". The final sentence in the form submitted by the company required that authorizations be dated subsequent to November 10, 1977. The figure "10" was stricken by the union and the figure "9" inserted in its stead and initialled.

20. The document, as amended by the union, bears the signatures of the union and, as the letter indicates, was returned, thus executed and initialled, to the respondent. The respondent's position with respect to the situation has already been indicated earlier in this decision.

21. There was no dispute concerning the rates set out for the various undisputed categories listed in Schedule "A". The Memorandum, incidentally, contains a provision in Exhibit "A" thereto, under the heading of "Wages", which simply states:

WAGES

First year 7%
Second year 6%

(It is understood that the Company has already implemented 6% of the first year settlement, so for those employees presently working an additional 1% will be granted effective the date of ratification.)

This provision was not written into the document submitted by the company to the union. The company maintained that the above increases are reflected in the figures set out in Schedule "A".

22. The differences between the parties therefore, in view of the limited amendment made to it by the union, cannot be whether Schedule "A" is properly part of the collective agreement (although that appeared to be the union's position at one stage), but is as to whether Schedule "A" should contain, among the other categories to which the parties have obviously agreed, the Quality Control category at a starting rate of \$4.60 as inserted by the union, or the Operator III at a starting rate of \$5.60 set out by the company. A further difference relates to the date in Article 3.01.

23. The evidence of the company at the hearing was that during the course of the strike, the Quality Control job was eliminated and the Operator III job created, and that this was the situation when the Memorandum was signed. On that basis, the factual solution

to that aspect of the dispute does not appear insoluble, nor does it appear to us that the question of the date for authorization of dues deductions presents an insurmountable problem.

24. The items in dispute may well have more significance to the parties than was made to appear at the hearing before the Board. They do, after all, form the basis for this application.

25. In any event, the disputes clearly demonstrate that the Memorandum of Agreement meant one thing to the union and another thing to the company. This is evident from the letter of February 22nd in which it is stated by the solicitor for the union that Schedule "A" does not comply with the classifications negotiated between the parties. There is also the disagreement on the dates.

26. That there were different understandings present in the minds of the parties when the Memorandum was signed is also clear from the manner in which the union felt constrained to deal with the document signed by the company in the latter's belief that it constituted a collective agreement incorporating all of the terms of settlement contained in the Memorandum. The document sent to the union by the company was obviously not the document returned to it by the union.

27. The question which the Board must decide on the above evidence is whether the company has failed to bargain in good faith and to make every reasonable effort to make a collective agreement as alleged in the complaint. The Board's answer to that question is that, although we find, for the reasons set out above, that neither the Memorandum of Agreement and its incorporated documents nor the document which was executed by the company and amended and signed by the union constitute a collective agreement, the respondent company bargained in good faith and believed that the document it prepared was, in fact, a collective agreement, subject only to execution by the union.

28. The complaint is accordingly dismissed.

1307-76-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. **Sherman Sand and Gravel Ltd.**, (Respondent).

Certification – Employee – Membership Evidence – Buildup – Whether owner operators are dependent contractors – Appropriate time frame for determining employee status – Whether conflict with federal anticommon legislation
 – Board applied the usual 30 day rule, found no conflict with the federal legislation and found certain persons dependent contractors

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and F.W. Murray.

APPEARANCES: *E.G. Posen for the applicant; S.G.J. Lane, Q.C. for the respondent.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER M.J. FENWICK; May 1, 1978.

1. This is an application for certification.
2. The application is in respect of certain owner-drivers who deliver sand and gravel for the respondent from its quarry at Milton. The status of these owner-drivers under the *Labour Relations Act* was raised as a preliminary matter, requiring the Board to determine whether these persons are "dependent contractors" under the Act, or whether they are independent businessmen falling outside of the collective bargaining structure established by the Act. Counsel for the respondent, in addition, argued that these provisions of the *Labour Relations Act* dealing with dependent contractors fell outside the legislative authority of the Province, being in direct conflict with the federal *Combines Investigation Act*. Finally, it was submitted by counsel for the respondent that, in the circumstances of this case, the Board should not apply its "30 day rule" for the purpose of determining whether employees not at work on the date of the application are to be treated as employees in the bargaining unit at the time the application was made.
3. In previous cases involving the application of the dependent contractor provisions of the Act the Board has been faced with the question of whether these provisions are within the legislative competence of the Province. The Board's view, as stated in these previous cases, is that the appropriate forum for the resolution of any constitutional argument of this nature is the Courts. The reasons for this conclusion can be found in *Superior Sand, Gravel & Supplies Ltd.*, Board File 1308-76-R, where it is stated:
 17. This is not the first time that this argument has been made to the Board. In *Indusmin Ltd.*, Board File 1374-76-R, the Board made it clear that it could not perform the function of a Superior Court by determining whether the provincial Legislature had acted beyond the legislative competence conferred upon it by the *British North America Act*. The assumption that must be made by a statutory tribunal such as this Board is that the Legislature intended that the statute should not extend beyond areas of provincial jurisdiction. Such an approach does not mean that the Board pays no regard to the constitutional implications of its decisions. When the Board is faced with particular fact situations, it is careful not to apply the *Labour Relations Act* in a manner that would extend it beyond the areas of provincial jurisdiction. See, for example, *Four B Manufacturing Limited*, [1976] OLRB Rep. Dec. 765. The Board assumes that the Legislature did not intend it to act beyond provincial jurisdiction and applies the statute accordingly. The application of this presumption of statutory interpretation is a much different function than the determination by the Board that certain parts of its own statutes are constitutionally inoperative. This latter exercise, in our view, is one that can only be performed by the Superior Courts.
4. We now turn to the facts as set out in the report of the Labour Relations Officer to determine whether the persons in question are dependent contractors within the meaning

of section 1(1)(ga) of the *Labour Relations Act*. The facts in this case do not reveal a situation markedly different from those present in other cases before the Board involving owner-drivers working out of a quarry. The persons in question are owner-drivers of dump trucks who deliver sand and gravel from the respondent's quarry to its customers. Although there are no formal written agreements between the individual owner-drivers and the respondent, it is clear that there exists a well-established relationship. The owner-drivers bring to the relationship their own services and a single vehicle while the respondent provides a steady source of work and income.

5. The evidence clearly indicated that the owner-drivers were responsible for the purchase, financing, licensing, operation, and maintenance of their trucks. All costs associated with their vehicles were paid by the owner-drivers. Such costs, moreover, were deducted from the gross income received by the owner-drivers for the purpose of calculating their income tax.

6. All but a small part of the owner-driver's income was derived from the respondent. On a few occasions when the respondent had no work available, the owner-drivers performed haulage work for others. The respondent, however, did not contest the fact that the owner-drivers looked to it for their economic livelihood.

7. The owner-drivers made themselves available at the quarry when it opened in the morning. The time at which the quarry opened varied somewhat depending on the seasonal demand for sand and gravel. If the quarry were to be opened earlier than usual, the owner-drivers would be notified on the day before. There is no doubt that the hours of work of the owner-drivers by and large coincided with the hours of operation of the quarry. The testimony of the owner-drivers indicated that, although there was no formal requirement to notify the respondent of any absences, they still felt some obligation to do so.

8. The work available at the beginning of the day was assigned to the owner-drivers according to a procedure established by the respondent at the suggestion of a committee of the owner-drivers. A list had been drawn up and the work assigned to the drivers on that list according to a priority that rotated on a daily basis. By this procedure the owner-drivers could share equally in the first work assignments of the day. The list was also used to allocate work among the owner-drivers when the quarry was less busy in the winter months. During this time the list was split so that the owner-drivers on each half of the list would report to work at the quarry on alternate weeks.

9. Once the drivers on the list had all received a first load at the beginning of the day, the work was then assigned to them according to who was first available to carry additional loads. A driver could lose his place in the queue, however, by refusing to carry a particular load in which case he had to wait until the owner-driver taking the load had received his next load. Not surprisingly, the evidence indicated that refusals to take a load were infrequent.

10. The work assigned to the owner-drivers required them to receive a load of sand or gravel at the quarry, to deliver the load to a destination designated by the respondent's dispatcher, to collect the payment for the load if delivered C.O.D., and to remit any such payment to the respondent. It is clear that the owner-drivers were free to choose the route taken to deliver the load and that they were not required to deliver a load within any set time.

However, there did appear to be a loose set of rules aimed at curtailing certain driving practices that would give an owner-driver an unfair advantage in obtaining work assignments. These rules were proposed by the owner-drivers themselves and, on occasion, enforced by the respondent. Collections on C.O.D. orders did not appear to be a large problem for the owner-drivers but the evidence indicated that where difficulties did arise officials of the respondent would assist the owner-drivers in collecting monies owing.

11. The respondent paid the owner-drivers by cheque twice a month. The amount of remuneration received by the owner-drivers was calculated by reference to the distance travelled and the weight of the load carried. The respondent, in consultation with the owner-drivers' committee, had established a number of geographic zones and a per ton rate for each zone. Where the owner-drivers were required to carry half loads, remuneration was calculated at a rate one-and-a-half times greater than the established rate. Remuneration did not take into account time spent waiting for a load or time spent delivering a load. The owner-drivers, however, would be remunerated for delays at the customer's end where the customer agreed to pay for waiting time.

12. In order to get paid for their work the owner-drivers were required to submit to the respondent copies of the customers' bills and a summary of loads carried setting out the haulage costs. The respondent supplied both types of form. The owner-driver when assigned a load would be given three copies of the customer's bill with one copy being retained by the respondent. Two of the three copies would be given to the customer by the owner-driver while the third copy would be returned, usually on a daily basis, to the respondent along with the haulage sheet summarizing the owner-driver's work. The haulage sheet was filled out in duplicate and both copies were given to the respondent. The respondent in turn would calculate the amount of money owing to the owner-driver for haulage.

13. The only deduction made by the respondent from the amount owing to an owner-driver for haulage would be the cost of gas purchased at the quarry. No deductions were made for income tax, unemployment insurance premiums, workmen's compensation premiums, or for medical and hospital insurance premiums. The owner-drivers did not receive any benefits from the respondent other than the remuneration for haulage. Holidays, vacations, or other fringe benefits were not part of the owner-drivers' remuneration.

14. The question then is whether these owner-drivers are in a position of economic dependence upon and under an obligation to perform duties for the respondent more closely resembling the relationship of an employee than that of an independent contractor. The approach taken by the Board when making this determination is set out in *Superior Sand, Gravel & Supplies Ltd., supra*:

24. Our task is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the type of economic dependence and the kind of business relationship, or obligation, that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employ-

ment relationship, more closely resembles the relationship of an employee than that of an independent contractor.

15. The respondent did not seriously dispute that there existed in this case an economic dependence more closely resembling that of the employee than that of the independent contractor. The owner-drivers clearly looked to the respondent for their economic livelihood, since work opportunities were created by the respondent and not by themselves. It is clear that the purchasers of sand and gravel looked to the respondent and not to the owner-drivers as the supplier of the haulage services. Haulage rates were set primarily by the respondent, charged to the customer by the respondent, and collected by the respondent. Where deliveries were made on a C.O.D. basis, although payment would be received by the owner-drivers, the payment would be remitted to the respondent. The evidence, moreover, does not appear to support the contention of counsel for the respondent that the risk of non-collection of C.O.D. accounts rested with the owner-driver. In those few cases where collection proved to be difficult the respondent would intervene to assist in the collection, indicating that the risk of non-collection rested with it.

16. The thrust of the respondent's argument was that the owner-drivers were not under an obligation to perform duties more analogous to that of the employee than of the independent contractor. Counsel for the respondent submitted that the collective bargaining status of the owner-drivers must be determined not only by reference to the duties performed by the owner-drivers but also by reference to the obligations imposed by the respondent. In other words, in order to determine that the owner-drivers are quasi-employees it must be determined that the respondent is a quasi-employer. The evidence in this case, according to counsel for the respondent, fell short of establishing that the respondent was a quasi-employer.

17. The definition of dependent contractor in section 1(1)(ga) of the Act, as we have already stated, requires us to examine the kind of business relationship present in any case where persons are claiming to fall within that definition. The form of business relationship must more closely resemble that of employer and employee than that of buyer and independent contractor. The exercise is a comparative one and it is clear that not all characteristics of the employment relationship need be present in order to find that a person is functioning as a dependent contractor. Ultimately, however, the Board must be convinced that the person is more akin to an employee than to an independent contractor. In this instance we agree with the respondent's argument that there must be a quasi-employment relationship. It should be recognized, however, that there is no single form of employment relationship but, rather, a wide variety of relationships that fall within this legal category. A truck driver might work under quite different terms and conditions than an office clerk, yet both persons could be employees. Thus, when determining whether a relationship more closely resembles that of an employee than of an independent contractor, the Board must be careful to choose the appropriate analogue.

18. What then is the appropriate comparison to make in this case? We consider that the situation of the owner-drivers should be compared to that of truck drivers employed to do the same kind of work. Such employees would have an obligation to make themselves available for work at all times, an obligation to follow the instructions of their employer, and an obligation to account for any money received on behalf of their employer. This type of employee would be subject to lay-off. Supervisory control over them would be limited be-

cause the job would be largely performed away from the site of the employer's business. Such employees, however, would be subject to certain rules and could be disciplined by either a warning, suspension or discharge.

19. The situation of the owner-drivers in this case closely resembles this model. These persons make themselves available during the quarry's hours of operation and work at the quarry on a full-time basis. The evidence indicates a clear practice of the owner-drivers advising the respondent in advance if they are going to be absent for any reason. Once loads are assigned to the owner-drivers, there is an obligation upon them to deliver the load to the destination designated by the respondent, to then collect for the load if delivered on a C.O.D. basis, and to remit such payments to the respondent. The work performed is accounted for on forms supplied by the respondent. Supervisory control, while probably less than that present in a true employment relationship, is by no means absent. There is no doubt that the respondent maintained considerable leverage over the owner-drivers through the assignment of work. Owner-drivers refusing to receive a load would lose their place in the queue. This type of penalty would appear to bear a close resemblance to a suspension. The respondent, moreover, had the ability to terminate the relationship on short notice, an action tantamount to discharge. A certain loose set of rules existed relating to driving practices within the quarry and these rules were sometimes enforced by the respondent. When work was scarce, the arrangement was that half the owner-drivers would report to work on alternate weeks – a situation closely resembling a lay-off.

20. The respondent argued that the situation of the owner-drivers was of their own creation and that it had not imposed any such obligations upon them. We disagree with the assessment of the evidence. The facts indicate that the situation of the owner-drivers was very much the product of a mutual arrangement. Although there was no written arrangement between them, it is clear that there existed an unwritten arrangement that resulted in the owner-drivers having certain obligations to perform duties for the respondent. While it may be that certain of these obligations were suggested by the owner-drivers, these suggestions were adopted and acted upon by the respondent.

21. In this case, having regard to all the evidence, we find that the owner-drivers in question are in a position of economic dependence upon and under an obligation to perform duties for the respondent more closely resembling the relationship of employee than independent contractor. These persons, therefore are dependent contractors within the meaning of the *Labour Relations Act*.

22. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

23. The applicant and the respondent are in agreement as to the description of the bargaining unit. The Board, having regard to this agreement, finds that all employees engaged as drivers working at or out of the respondent's quarry at Milton, save and except dispatcher, persons above the rank of dispatcher, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purpose of clarity "all employees" refers to drivers found to be "dependent contractors" under section 1(ga) of the *Labour Relations Act*.

24. The Board must now turn to the respondent's contention that the Board, in the

circumstances of this case, should not apply its “30 day rule” for the purpose of determining whether employees not at work on the date of application are to be treated as employees in the bargaining unit at the time the application was made. The rule applies generally to all applications from outside the construction industry. In order to meet the requirements of this rule an employee must be at work both some time in the period thirty days prior to the date of the filing of the application and be at work, or expected to be at work, some time in the period thirty days after the date of application. These requirements take into account two concerns – that unions and employers be able to identify the constituency of employees that will be used by the Board when assessing the degree of membership support enjoyed by an applicant; that some employees who are not at work at the date of the application may still have a sufficiently substantial employment attachment to justify inclusion in the employee constituency and a voice in the selection of the bargaining agent. The application of this rule results in what the Board considers to be the best balance between these two competing concerns. A heavy onus, therefore, rests upon any party seeking an exemption from this rule.

25. In the circumstances of this case we see no reason to deviate from the “30 day rule”. This application was filed with the Board on October 26, 1976. The respondent’s witness, Norm Flemington, indicated in his testimony that the normal numbers of vehicles employed in October would be somewhere between thirty and forty, but that October 1976 was not as busy as usual. The application of the 30 day rule to this case places twenty-nine employees within the employee constituency for the purposes of the count. Moreover, the list of employees drawn up by the respondent and the owner-drivers shows twenty-six regular drivers and five spares. On these facts we see no reason to depart from our normal practice of applying the 30 day rule.

26. Nor is this a case for the application of a build-up approach where the Board would defer consideration of this certification application. This approach is applied where the Board considers that a build-up of the work force is likely to take place within a reasonable period. In this case, we consider that a substantial and representative number of employees were at work at the date of the filing of the application.

27. The Board finds that twenty-nine employees were in the bargaining unit at the time the application was made. The applicant has submitted satisfactory proof of membership in respect of thirteen of these employees.

28. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 3, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

29. The application is dismissed.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. Having regard for all of the evidence, I would have found that the owner-operators in question were not in a position of economic dependence or not under obligation to perform duties and accordingly should be found to be independent contractors.
 3. For the same reasons expressed in my dissent in the *Superior Sand, Gravel & Supply Ltd.*, Board File 1308-76-R, I would have arrived at this conclusion.
 4. There were, however, certain differences, but they were not, in my opinion, of a substantive nature so as to change the result.
 5. One of these differences was the fact that the owner-operators employed by the respondent actually performed less outside work for other firms or organizations requiring their services than the owner-operators employed by Superior Sand, Gravel & Supply Ltd.
 6. The other difference is that there were no formal written agreements between individual owner-operators and the respondent as there was in the Superior Sand, Gravel & Supply Ltd.
 7. Still another difference is the fact that the respondent in the case before us did not make any percentage charge-back for credit or record keeping services as was the case in Superior Sand, Gravel & Supply Ltd.
 8. I am of the opinion that the respondent did not, however, despite the above-noted differences, exercise any more control, and particularly economic control, over the owner-operators than that control exercised by Superior Sand, Gravel & Supply Ltd. in its dealings with its owner-operators.
 9. Concerning the rules relating to driving practices and those unwritten arrangements which take the form of certain forfeitures in the event that one individual declines a particular load which was probably unattractive when compared with other loads, leaving such work to be done by others, it is clear that all of these rules or arrangements, while actually administered by the respondent, were initially adopted at the suggestion of the owner-operators in order to establish some form of orderly assignment of the work between competing organizations. Here it is clear that these same rules applied to all, including those who were themselves employers, and who, by the Board's decision, are to be excluded from the bargaining unit.
 10. It is obvious certain rules governing the relationship of one competitor to another are necessary in any business, particularly where there may be a number of competitors seeking the same work. One can equate, for example, the concept of the bid by sealed tender, submitted by a pre-determined time, as one business rule or arrangement often utilized when dealing with a number of competitors who seek to perform the same work.
 11. In conclusion, I would have found all owner-operators to be independent and accordingly dismissed the application.
-

1769-77-R Service Employees Union, Local 268, (Applicant), v. Thunder Bay Ambulance Services Inc., (Respondent).

Sale of a Business – Predecessor hospitals engaged in the management and operation of an ambulance service – Assets owned by Ministry of Health and right to operate subject to licence – Operation continued by successor with same employees, management organization and use of assets owned by Ministry – Board found transfer and continuation of bargaining rights.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *J. Sack for the applicant; B.R. Baldwin and D. Rudyke for the respondent.*

DECISION OF THE BOARD; May 2, 1978

1. The name “Thunder Bay Ambulance Services” appearing in the style of cause of this application as the name of the respondent is amended to read: “Thunder Bay Ambulance Services Inc.”

2. This is an application brought under Section 55 of the Act wherein the applicant union asks the Board to find that a sale of a business within the meaning of section 55 of the Act has occurred between St. Joseph’s General Hospital, Thunder Bay, and McKellar General Hospital, Thunder Bay on the one hand and Thunder Bay Ambulance Services Inc. on the other. The applicant asks that the Thunder Bay Ambulance Services Inc. be found to be the successor employer and be required to bargain with the applicant union with a view to making a collective agreement.

3. This application involves the alleged “sale” of an ambulance service in the Municipality of Thunder Bay. Prior to the alleged “sale” on February 5, 1978, two separate ambulance services covering the Municipality of Thunder Bay were operated; one by the St. Joseph’s General Hospital and the other by the McKellar General Hospital. A central dispatch was located at the St. Joseph’s General Hospital. The dispatchers working out of St. Joseph’s Hospital were covered by the subsisting “office and clerical” collective agreement between that Hospital and the applicant union. The full time driver attendants working out of St. Joseph’s Hospital were covered by the subsisting “all employee” collective agreement between that Hospital and the applicant union and the driver attendants working out of McKellar General Hospital were covered by the “all employee” agreement between that Hospital and the applicant union. The applicant union is the union party to each of these agreements. These agreements expired on March 31, 1978. The applicant served notice to bargain on the respondent by letter dated February 3, 1978.

4. The operation of an ambulance service in the Province of Ontario is a closely regulated and licensed activity. Licences to operate are issued (and revoked) by the Ambulance Services Branch of the Ministry of Health. Both St. Joseph’s Hospital and McKellar Hospital were licensed by the Ministry of Health during the period they carried on their respective ambulance services. The Ambulance Services Branch of the Ministry of Health owns virtually all of the ambulance vehicles in the province and the ancillary equipment (stretchers, oxygen regulators, ventilators and communication equipment etc.) necessary to the operation of an ambulance service and maintains these vehicles and equipment to a uniform

standard. The Ambulance Services Branch funds local ambulance services and sets a global budget which the operator must meet if he is to make a profit. St. Joseph's and McKellar Hospitals were funded by the Ambulance Services Branch and operated vehicles and equipment which belonged to the Ministry of Health during the period they operated their respective ambulance services. The respondent is also licensed by the Ambulance Services Branch of the Ministry and operates virtually the same vehicles and uses the same equipment.

5. In 1976 the Ambulance Services Branch undertook a cost-efficiency study of the ambulance services provided in the Regional Municipality of Thunder Bay and on the basis of this study concluded that the service in the city of Thunder Bay could be provided at a reduced cost if St. Joseph's Hospital and McKellar Hospital were to amalgamate their respective services. A recommendation to this effect was put to the two Hospitals. They were not prepared to amalgamate, however, and decided instead to discontinue their ambulance services. In the result the Ambulance Services Branch made a public request for proposals to operate an ambulance service in the Thunder Bay area. A notice was placed in every major newspaper in the province in February 1977 inviting individuals and organizations, including municipalities, to submit proposals for an Ontario Ministry of Health Contract to "develop, establish, operate, manage and administer an ambulance service in the Thunder Bay area."

6. Mr. D.L. Rudyke submitted a proposal pursuant to this public notice and to the detailed Request for Proposals which was released on February 23, 1977. Mr. Rudyke was employed by St. Joseph's Hospital as Director of Ambulance Services and Dispatch at the time he submitted his proposal and he remained in this capacity up to the date the new ambulance service commenced operation. Mr. Rudyke was asked by the Ministry of Health, by letter dated June 30, 1977, to attend at a meeting in Toronto on August 30, 1977. A number of prospective operators were interviewed at this time. Mr. Rudyke was subsequently advised by the Director of the Ambulance Services Branch, by letter dated November 2, 1977, that his proposal had been accepted. He was further advised by letter dated November 15, 1977 that "as soon as your application for licence has been received it will be issued in your name and will include the above noted agreement as the only condition." The "above noted agreement" referred to in the November 15 letter was forwarded to Mr. Rudyke for signature on December 23, 1977. The agreement, for a term ending March 31, 1979, set out the cash flow arrangements, the conditions of termination and stipulated that "personnel of the operation shall at all times be servants or agents of the operator and not the minister."

7. In late November, 1977 Mr. Rudyke advertised in the press for ambulance drivers, attendants and dispatchers. A copy of the advertisement was posted in the two hospitals. Applications for employment were subsequently accepted and processed. All of the persons employed in the ambulance service of the respective hospitals who applied for employment with the Thunder Bay Ambulance Service were hired. All 17 of the persons employed in the ambulance service at St. Joseph's Hospital (including 4 part-timers) applied for and were given employment. Seven of the thirteen persons employed in the Ambulance Service at McKellar Hospital applied for and were given employment. These persons comprise the respondent's operation staff.

8. Arrangements were made by the Ambulance Services Branch to continue the pre-

vious services in operation until February 5, 1978 and to commence the new service as of that date. Accordingly, all of the persons hired by the new service ceased their hospital employment on February 4, 1978 and commenced employment with Thunder Bay Ambulance Services on February 5, 1978. Rates of pay and seniority for vacation purposes were maintained for all employees but fringe benefits were newly established. The respondent has altered the matter of coverage.

9. The union argues in this case that the same persons as were employed by the predecessor employer have been employed by the successor for the purpose of providing the same service in the same locality with the same equipment. The union takes the position that on the basis of these facts the Board must find a transfer and a continuation of the business and maintain the bargaining rights of the trade union. The respondent, on the other hand, argues that in order to make the finding urged by the applicant union there must be a person who sells a business and a person to whom it is sold. The respondent argues that the facts of this case do not disclose that a sale has transpired in that the previous operators did not dispose of anything or sell anything to the respondent. The respondent asserts that whereas it is providing essentially the same service, it went through the lengthy proposal system, applied for and received its own licence, and advertised for and hired its own employees and in none of these did it deal with the previous operators. The respondent cites the *Sunnybrook Food Market* case, [1974] OLRB Rep. Jan. 47 in support of its argument that the mere fact that the alleged successor provides the same type of service or operates the same type of business as did the predecessor does not in and of itself constitute a sale within the meaning of Section 55 of the Act.

10. The relevant portion of Section 55 of the Act reads as follows:

“55. (1) In this section,

(a) ‘business’ includes a part or parts thereof;

(b) ‘sells’ includes leases, transfers and any other manner of disposition and ‘sold’ and ‘sale’ have corresponding meanings.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.”

11. The word “sells” as used in Section 55 of the Act has been given an expansive statutory definition so as to “include leases, transfers and any other manner of disposition.” In the leading *Thorco Manufacturing Co.* case, 65 CLLC 787 the Board discussed the components of the statutory definition in the following terms:

“The word *transfers* is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, interests etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another.”,

and went on to state:

“... it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words ‘*and any other manner of disposition*’ as an omnibus or saving provision intended to include disposition of the business ... by any mode or means whatever not appropriately described by ... ‘leases’ or ‘transfers’.”

The section does not require that there be a direct transfer between predecessor and successor and the Board has unequivocally stated that “it makes no difference whether the business has been transferred directly from the employer named in the collective agreement (or for which the union holds bargaining rights) or whether it has been transferred through a receiver or some other intermediary.” (See *Winiker Industrial Auctioneers Ltd.* Board File No. 1257-77-R dated January 20, 1978). Indeed, in a number of cases the Board has found a sale of a business where the disposition of the predecessor’s business has been made by a receiver. (See *Marvel Jewellery Limited*, [1975] OLRB Rep. Sept. 733, *D.H.I. Limited*, [1974] OLRB Rep. Aug. 237, *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691). The word “sells” as used in Section 55 of the Act encompasses any transaction or series of transactions which results in the transfer of the predecessor’s “business or parts thereof.”

12. The expansive meaning which attaches to the term “sells” as used in Section 55 underscores the purpose of the section. The section is designed to preserve bargaining rights regardless of the legal form of the transaction, where there is a continuum of the business. The Board discussed the intent of the section in *Aircraft Metal Specialists Limited*, [1970] OLRB Rep. Sept. 702 in the following terms:

“Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and Section 47A (now Section 55) allows the union to pursue that bargaining right when all or part of the business is sold.”

Bargaining rights which are conferred by the Board or by voluntary recognition attach to a particular business and continue by operation of Section 55 so long as the business continues.

13. Although the section is designed to apply to all manner of transactions it is clear that whatever the form of the transaction it must result in a continuation of the business to which the union’s bargaining rights attach. The fundamental task which confronts the Board in these cases, therefore, is to determine the nature of the alleged predecessor’s business and whether or not that business has been transferred. In this regard the Board must distinguish between the predecessor’s business and its components (i.e. fixed assets, good-

will, inventory, accounts receivable, customer lists, leases etc.). Clearly, one or more of the component elements of a business can be transferred without there being a “sale of a business”. (See *re Dufferin Steel Awico Division* case, [1976] OLRB Rep. March 81 and the cases referred to therein.) The Board has stated that “the most important factor considered ... is the nature of the work performed” and indeed, in most cases where there has been a transfer of one or more of the component elements of the business and the work continues unchanged the Board will find that there has been a sale of a business within the meaning of Section 1(3)(b) of the Act. (See *Culverhouse Foods Limited* case (supra).) The Board, however, must be careful to distinguish between the predecessor’s “business” and a similar or parallel business which performs work of a similar nature. In the former the transfer is a sale of a business within the meaning of Section 55 whereas in the latter situation it is not. The *Sunnybrook Food Market* case (supra) cited by counsel for the respondent company, involved the sale of certain assets and the start up of a similar business at the same location as the predecessor. Notwithstanding the sale of certain assets and the similarity of work, the Board found that the predecessor’s “business” had not been transferred. (See also *Zehrs Markets Ltd.* [1974] OLRB Rep. June 331, *Ralph Ford Electrical Contractors Ltd.*, [1974] OLRB Rep. June 388 and *C.C.C. & Point Anne Quarry Co.* [1975] OLRB Rep. Dec. 905.) The union’s bargaining rights attach to the predecessor’s business and their preservation is contingent upon a continuation of that “business”.

14. This case requires a careful analysis because of the complicating factor of third party involvement. The Ministry of Health, although neither the predecessor nor successor employer, owned the assets which were necessary to the ambulance service provided by both the alleged predecessor and successor and licensed and regulated the alleged predecessor as it does the successor. The Ministry is also the source of the cash flow as it provided and continues to provide funds on a monthly basis in an amount agreed between the operator of the ambulance service and itself. These funds are the only source of revenue for the operator of the ambulance service. The integral involvement of the Ministry must be taken into account in considering the nature of the alleged predecessor’s business and more importantly, in determining whether or not there has been the transfer of that “business” or the establishment of a parallel or similar business.

15. That part of the predecessor’s business which is at issue can best be described as the management and operation of a group of assets owned by the Ministry of Health, for the purpose of providing ambulance service in the Municipality of Thunder Bay. The alleged successor manages and operates these same assets for the same purpose and therefore its business can be described in identical terms. This similarity of description, however, does not necessarily establish a “continuum” of the predecessor’s business. In the absence of any direct contact between predecessor and successor, in the absence of the successor purchasing anything from the predecessor, and in the absence of the predecessor receiving any consideration from the alleged successor, it might be said that the predecessor employer did not sell or transfer its business but rather that it went out of business and a different, albeit parallel business, took its place. In the context of a regulated monopoly, the lack of hiatus and the similarity of function cannot be the overriding considerations. The issue must be determined on the basis of what, if anything, was transferred to the alleged successor.

16. In a strict commercial or corporate sense, it is clear that there has been no transfer between the predecessor hospitals and the respondent as would constitute a sale. Indeed, the predecessors had no assets, inventories (other than sheets, towels and other toiletries),

accounts receivable or customer lists which could have been transferred and they were prohibited by law from transferring their licences to operate. The predecessors depended upon the maintenance of their relationship with the Ministry and not on customer goodwill. As discussed in para. 13 herein however, the Board must look beyond the form of the transaction in determining if there has been a "sale of a business" within the meaning of Section 55 of the Act. Notwithstanding the absence of contact between the hospitals and the Thunder Bay Ambulance Service, and notwithstanding the lack of consideration given and received between the two, the Board is satisfied that the essential elements of the predecessors' businesses were transferred to Thunder Bay Ambulance Services Inc. so as to constitute the sale of a business within the meaning of Section 55 of the Act.

17. In the view of the Board, the two essential elements of the predecessors' businesses were transferred to the alleged successor. Firstly, the exclusive use of the assets owned by the Ministry of Health was transferred. Although the same licence or piece of paper was not transferred between the two, the Board has no hesitation in finding that the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred. Secondly, the predecessors' management and organization in the person of Mr. Rudyke, and the predecessors' employees were also transferred. The predecessors' ambulance operations were largely managerial and organizational in nature and it follows that the transfer of managerial skills, albeit through a request for proposal system and competition, and the continuation of identical job functions filled by the same persons as were employed by the predecessors must weigh heavily with the Board.

18. Having regard to the transfer of the exclusive right to use the Ministry's assets, to the transfer of managerial skills and to the uninterrupted continuation of the identical job functions, the Board must conclude that the Ministry of Health, the entity charged with maintaining an ambulance service in the Municipality of Thunder Bay, did not facilitate the establishment of a similar or parallel business but rather it served as the necessary link in the transfer of the predecessors' businesses to the successor. It is the finding of the Board, therefore, that a sale of a business within the meaning of section 55 has occurred and that the bargaining rights of the union, which were established in respect of the predecessors' businesses, should be preserved. The applicant trade union was entitled to give notice to the predecessors under section 45 of the Act and accordingly, the Board declares, pursuant to the provisions of section 53 of the Act, that the trade union is entitled to give the respondent a written notice of its desire to bargain with a view to making a renewal collective agreement.

0831-77-R Canadian Food and Associated Services Union, (Applicant), v. Windsor Arms Hotel Limited, (Respondent), v. International Beverage Dispensers' & Bartenders Union Local 280, (Intervener), v. Group of Employees, (Objectors).

Certification – Bargaining Unit – Collective Agreement – Board issuing interim certificate excluding persons covered by existing agreement – Board interpreting agreement in order to define the

scope of certificate.

BEFORE: N.B. Satterfield, Vice-Chairman, and Board Members H. J. Ade and M. J. Fenwick.

APPEARANCES: *M. Swenarchuk, Jean-Pierre Serel and Wendy Iler for the applicant; I. T. Bern and F. Faigaux for the respondent; Alick Ryder and Julius Troll for the intervener; no one for the objectors.*

DECISION OF THE BOARD:

1. A hearing was held February 24, 1978 for the purpose of hearing representations of the parties with respect to the report of the Labour Relations Officer on an examination into the duties and responsibilities of some 25 waiters of the respondent affected by an application for certification.

2. By its decision issued September 19, 1977, the Board granted an interim certificate to the applicant for an all employee unit with certain exceptions, one of which is the employees covered by the subsisting collective agreement between the respondent and the intervener. The parties were in dispute regarding the 25 waiters, with the intervener claiming these employees are covered by its subsisting collective agreement with the respondent. The parties indicated a willingness to have the Board determine the matter and the Board saw the issue as one which was properly part of the certification procedure and that it should determine the composition of the bargaining unit. Accordingly, an officer was appointed to inquire into the duties and responsibilities of the disputed waiters.

3. At the hearing the intervener raised a preliminary argument that the Board, in these circumstances, could not proceed simply to determine from the Officer's report whether the waiters were within the scope of the applicant's bargaining unit #1 defined in paragraph 6 of the Board's September 19, 1977 decision. Rather, the Board is required firstly to determine whether the waiters are included within the scope of the intervener's collective agreement with the respondent. After hearing the submissions of all parties, the Board ruled that the agreement is ambiguous in this respect, thus placing the Board in one of those periodic situations where it must act as an arbitrator to interpret a collective agreement of one of the parties before it. The intervener is recognized by the Board as a trade union which bargains on behalf of employees who are members of a craft within the meaning of section 6(2) of The Labour Relations Act. Therefore, the heart of the issue before the Board is whether its collective agreement with the respondent in this instance is limited to the employee's traditional craft scope. If the Board so finds, it next would have to determine if the waiters in dispute are within that craft, in which case, they are excluded from the applicant's unit or if not within the craft, they are included in the applicant's unit. The applicant and intervener both rely on the Officer's report if it becomes necessary to determine the craft status of the waiters.

4. The parties to the collective agreement at issue are the respondent and the intervener Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union and it is a matter of record that the agreement is identical to the master agreement between The Hotel Association of Metropolitan Toronto and the respondent. The relevant sections of the agreement

are Article 2 – Scope, Article 3 – Recognition, and Schedule B – Job Titles and Description, each of which is set out below:

Scope

This Agreement applies to all full-time and part-time male and female employees employed in the beverage departments in the licensed establishments listed on Schedule “H” attached hereto, as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages.

Recognition

The Association acknowledges that the employees in each of the units described above have selected the Union as their sole and exclusive collective bargaining agent, and it recognizes the Union as such for all the employees in each of the said Units.

Job Titles and Descriptions

Tapman Under the supervision of manager, and/or assistant manager, may be required to control stock, handle cash, connect casks to pumps, fill orders, maintain order and discipline in the room he is in and, in the absence of the manager and/or assistant manager, to enforce observance of all the regulations of the Liquor Licence Board as they pertain to his duties and the duties of those under him.

Waiter Under the supervision of the manager and/or assistant manager, tapman or head bartender may be required to perform the following duties: Take verbal instructions re arrangements of tables and chairs in the room and shall be assigned to a specific station; take orders from customers and attend to same, making all necessary cash transactions with the Tapman, Bartender, Cashier and the customer; take care of the cleanliness of his working area, particularly the tables and ashtrays during his working hours and perform related duties as required. Waiters shall not be required to sweep or mop floors or to pile or set chairs, subject to the fact that waiters shall be required to maintain clean and orderly work areas during sale hours. Waiters will also be responsible to observe and assist in the observance of all the regulations of the Liquor Licence Board. Waiters may also be required to operate automatic beer dispensing equipment or other automatic dispensing equipment in which event they shall be re-classified and paid in accordance with Schedule C.

Composite Job Where a waiter is required to exercise tapman or bartender’s duties, he shall receive the waiter’s or tapman’s or bartender’s rates of wages for the amount of hours worked on each job respectively.

Bartenders (Stool and Service) Under the supervision of manager, assistant manager or head bartender, may be required to control stock, handle cash, service customers, waiters or waitresses and attend to same making all necessary cash transactions; be responsible for the cleanliness and administration of his Bar during his working hours and perform related duties as required; be responsible to observe and assist in the observance of all regulations of the Liquor Licence Board. If a bartender is required to work more than twenty hours on the Service Bar in any one week, he shall receive the regular rates of wages as a Service Bartender.

Composite Stool and Service Bartender Where a bartender is required to service both waiters and a Stool Bar at the same time he shall be paid according to the rates set out in Schedule C for all hours so worked.

Bar-Boys or Improvers Under the supervision of manager, assistant manager, head bartender, is required to assist generally behind the Bar and be responsible for cleanliness of same. Duties may include the stocking of all supplies, washing and polishing of glasses and will also include actual serving of partrons [sic] and waiters or waitresses only under the constant control and supervision of qualified bartender. It is understood and agreed that a bar-boy and/or an improver may assume full responsibility of a Bar only in an emergency. In all other instances, he shall receive regular bartender's rates.

Clause 19.01 makes Schedules "A" to "F" inclusive part of the collective agreement. There is no Schedule "H" as referred to in the scope clause. However, it is a matter of record with the Board that Schedule "H" is a schedule forming part of the union's collective agreement with the Hotel Association and lists the employers (i.e., licensed establishments) who are covered by that agreement.

5. The Windsor Arms Hotel operates four dining rooms for which a single dining lounge license has been issued under The Liquor Licence Act, R.S.O. 1970 c.250. Three of these dining rooms, The Restaurant of the Three Small Rooms, The Grill and The Wine Cellar are designated under the license as one area known as the Three Small Rooms. The license designates a second area known as the Courtyard Cafe. All of the waiters in dispute are employed in these two areas: 13 in the Three Small Rooms and 12 in the Courtyard Cafe. The hotel holds a separate bar license issued under The Liquor Licence Act under which its Bar Twenty-Two operates. The waiters employed in this room are not in dispute and, while it is not in evidence that they are covered by Local 280's agreement, it may be inferred that is the case.

6. The ambiguity of the collective agreement in terms of its scope arises from the use of the adjective "beverage" in respect to the nouns "departments" and "waiter" in the scope clause. Does its use have a limiting effect so that the agreement applies to employees employed in departments which serve only or primarily beverages (and in this matter alcoholic beverages), which the applicant submits is the case, or is it descriptive in a non-restrictive way, defining employees who are engaged in activities which include the serving of alcoholic beverages as the respondent argues?

7. Both parties elaborated these arguments before the Board, each relying on the language in two sections of the collective agreement: the scope clause and Schedule "B". The Board has carefully considered these arguments and, relying in the main on the same sections of the agreement, concludes that the meaning of the language reasonably bears the interpretation that the agreement applies to employees engaged primarily with the service of alcoholic beverages.

8. The Board's task of interpreting the scope clause is made the more difficult by the way in which the parties to the collective agreement have adapted to their use the union's collective agreement with the Hotel Association. A reading of the entire agreement reveals several references to the Association (see for example, Article 3 quoted above); the same article refers to units (i.e., bargaining units) in the plural number; and there are numerous references to more than one employer with nothing to indicate that the Windsor Arms Hotel is more than one employer. In spite of this additional language handicap, the Board concludes that the use of the word beverage increases the exclusivity of each of the words to which it is attached. Employees coming within the bargaining unit are defined by means of job titles, which is such an exclusive definition that no exceptions have to be stated in defining the unit. Even so, the unit is further restricted to employees doing the work described by the job titles in the beverage department of the licensed establishment (i.e., employer). In other words, an employee of any other department, even if he is doing work described by one of the job titles, would not be in the bargaining unit definition. However, this situation describes better what a beverage department is not, rather than what it is. Turning to the word "waiter", any commonly used dictionary of the English language defines the word to mean "a person who waits on table". Thus the noun standing alone encompasses the serving of anything that is required. If an adjective is added it has the effect of specializing or restricting it. Thus a dining room waiter would be one who waits table in a dining room; a banquet waiter is one who serves or specializes in serving at banquets; and a beverage waiter is one who serves or specializes in serving beverages, and in the context of the matter at hand, alcoholic beverages. In the same context, we can view the words beverage department as meaning a department that specializes in (alcoholic) beverages.

9. The Board finds the specialization effect of the word beverage more in keeping with the focus of the scope clause and Schedule "B" than the proposition put forward by the intervener that the purpose of the word beverage was to define where the waiters serve, in other words, anywhere alcoholic beverages are served. Counsel for the intervener argued also that the description of waiter in Schedule "B" makes no reference to the word beverage and that it contains nothing that could not apply equally well to waiters in the four dining rooms as to the waiters in Club Twenty-Two. While this may be correct as far as it goes, the description is quite incomplete if it is intended to embrace dining room waiters. In this respect the Board accepts the argument of counsel for the applicant with reference to waiters being supervised by bartenders (when a manager or assistant manager is not there); the absence of any reference to the waiters' usual source of supervision from the captains and maitres d'hotel, or to the bus-boys who work with them; and the description's entire focus on the relationships with jobs usually associated with beverage service supports the concept of a function which specializes or is primarily engaged in the serving of alcoholic beverages.

10. The effect of the Board's finding that the agreement applies to employees engaged primarily with the service of alcoholic beverages is to say that the agreement is confined to the traditional craft bargaining unit represented by Local 280. Therefore, it must now turn

to the report of the Labour Relations Officer to see if any of the waiters in dispute are primarily engaged in the sale of alcoholic beverages and thus within the scope of the agreement, or whether they fall within the scope of the applicant's unit #1. This "primarily engaged" test has evolved from the Board's practice over the years in distinguishing which employees constitute a craft unit suitable for representation by Local 280. This is a well established practice followed in a substantial line of cases (See *Orangeroo Canada Limited*, [1974] OLRB Rep. Nov. 761 and the cases cited therein). Counsel for the intervener argued that this test has been applied by the Board in respect to granting certificates and it should not be imported into an interpretation of the intervener's collective agreement with the respondent. The Board has not used the test in this matter for that purpose, but having determined that the scope of the intervener's collective agreement is not sufficient as of the date of this application to embrace the disputed waiters, it must now determine whether they are appropriate for including in the applicant's or the intervener's unit. The Board's "primarily engaged" test is entirely suited to this purpose.

11. The parties hereto received notice of the Labour Relations Officer's report mailed December 19, 1977. All three parties filed written submissions with the Board as to the conclusions it should draw from the report. Having regard to the evidence contained in the report and the representations of the parties on it, the Board finds that the evidence establishes conclusively that the waiters are not primarily engaged in the serving of alcoholic beverages. The evidence is on file with the Board and there is no need to highlight it in this decision.

12. The composition of the bargaining unit is now finally resolved. The Board accordingly finds that all employees of the respondent in the Municipality of Metropolitan Toronto, employed at the Windsor Arms Hotel, Noodles, and the Bay Street Car, save and except supervisors and assistant supervisors, persons above the rank of supervisor, front desk clerks, office staff, musicians, maitres d'hotel, assistant maitres d'hotel, captain waiters, chefs, sous-chefs, chefs de partis who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by a subsisting collective agreement between the respondent and Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders International Union, A.F. of L., C.I.O., C.L.C., constitute a unit of employees of the respondent appropriate for collective bargaining.

13. For purposes of clarity, it is to be noted that waiters who are primarily engaged in the serving of alcoholic beverages are excluded from the bargaining unit described in paragraph 12 above.

14. A formal certificate will now issue to the applicant.

CASE LISTINGS APRIL 1978

	Page
1. Applications	
(a) Bargaining Agents Certified	89
(b) Applications Dismissed	98
(c) Applications Withdrawn	101
2. Application under Section 1(4)	102
3. Application under the Employees Health & Safety Act	102
4. Applications for Declaration Terminating Bargaining Rights	102
5. Application for Declaration of Successor Status	103
6. Applications for Declaration that Strike Unlawful	103
7. Applications for Declaration that Lock-Out Unlawful	103
8. Applications for Consent to Prosecute	104
9. Complaints under Section 79 (Unfair Labour Practice)	104
10. Application for Consent to Early Termination of Collective Agreement	106
11. Application under Section 55	106
12. Applications for Determination under Section 95(2)	106
13. Applications under Section 112a	106
14. Application for Reconsideration of Board's Decision	107

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1978

BARGAINING AGENTS CERTIFIED DURING APRIL

NO VOTE CONDUCTED

1308-76-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Superior Sand, Gravel & Supplies Ltd. (Respondent).

Unit: "all employees engaged as truck drivers working at or out of the respondent's gravel pit at Maple, Ontario, save and except dispatchers, persons above the rank of dispatcher, office and sales staff." (25 employees in the unit). (*Having regard to this agreement*).

0601-77-R: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. Rondar Services Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1481-77-R: Ontario Nurses' Association (Applicant) v. Bestview Holdings Limited (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Cornwall, save and except director of nursing and persons above the rank of director of nursing." (7 employees in the unit). (*Having regard to the foregoing*).

1540-77-R: United Steelworkers of America (Applicant) v. S. D. Adams Welded Products Limited (Respondent).

Unit: "all employees of the respondent at Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for twenty-four hours or less, students employed during the school vacation period, and persons now covered by a subsisting collective agreement." (30 employees in the unit). (*Having regard to the agreement of the parties*).

1544-77-R: United Plant Guard Workers of America Local 1962 (Applicant) v. Olympia & York Developments Limited (Respondent).

Unit: "all security guards (security officers) employed by the Respondent at First Canadian Place, in the Municipality of Metropolitan Toronto, save and except staff sergeants, persons above the rank of staff sergeant, persons employed in the Building Computer Centre, persons employed at the truck elevators and in the receiving department, persons employed regularly for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*).

1592-77-R: Office and Professional Employees International Union, Local 225 (Applicant) v. Canada Employment and Immigration Union (Respondent).

Unit: "all employees of Canada Employment and Immigration Union employed in its Head Office, located in the City of Ottawa and in its Ontario Regional Office, located in the City of Toronto, save and except the Director, Administration and Finance, the Director, Operations and the Secretary to the National President." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1817-77-R: Service Employees International Union, Local 183, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Beacon Hill Lodges of Canada Ltd. (Respondent).

Unit: "all employees of Beacon Hill Lodges in Ottawa, Ontario regularly employed for not more than 24 hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisors or foremen, office staff and students employed during the school vacation period." (62 employees in the unit). (*Having regard to the agreement of the parties*).

1820-77-R: Ontario Nurses' Association (Applicant) v. Arnprior and District Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit #1: "all registered and graduate nurses employed by the respondent at Arnprior engaged in a nursing capacity, save and except head nurses, persons above the rank of head nurse, in-service co-ordinator and persons regularly employed for not more than twenty-four hours per week." (12 employees in the unit). (*Having regard to the foregoing agreements*).

Unit #2: "all registered and graduate nurses employed by the respondent at Arnprior engaged in a nursing capacity who are regularly employed for not more than twenty-four hours per week, save and except head nurses, persons above the rank of head nurse and in-service co-ordinator." (34 employees in the unit). (*Having further regard to the foregoing agreements*).

1856-77-R: Labourers' International Union of North America, Oil and Gas Technicians, Service, Domestic and General Workers Local 1267 (Applicant) v. Consolidated Fibers Ontario Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees working in and out of its operation in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and those persons regularly employed for not more than twenty-four hours per week." (31 employees in the unit).

1864-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pacific Prefab Homes and Cottages Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1865-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Colonial Homes Limited (Respondent).

Unit: “all carpenters and carpenters apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1892-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. R. Gendreau Plumbing Company Limited (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1893-77-R: Employee’s Association of Anderson Haulage Limited (Applicant) v. Don Anderson Haulage Limited (Respondent) v. Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener).

Unit: “all employees of the respondent working at or out of Stouffville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (34 employees in the unit). (*Having regard to the agreement of the parties*).

1897-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. V. J. Rabito Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1899-77-R: Hotel & Motel and Restaurant Employees Union, Local 893, Atikokan, Ontario, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. John The Sportsman’s Restaurant Ltd. operating as the Little Falls Dining Club (Respondent).

Unit: “all employees of the respondent employed at The Little Falls Dining Club in the Little Falls Community Centre Dining Room and Lounge, Atikokan, Ontario, save and except manager and persons above the rank of manager.” (13 employees in the unit).

1903-77-R: International Association of Bridge, Structural and Ornamental Ironworkers Local Union 721 (Applicant) v. Canam Steelworkers Inc. (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1906-77-R: The Federation of Community Agency Staffs (Applicant) v. Metropolitan Toronto Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of the respondent at the Harold Lawson residence in the Municipality of

Metropolitan Toronto, save and except supervisors and those above the rank of supervisor, secretary to the program manager, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons covered by the subsisting collective agreement between the respondent and the applicant federation.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at the Harold Lawson residence in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week including students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, residential teachers regularly employed for not more than 24 hours per week and persons covered by the subsisting collective agreement between the respondent and the applicant federation.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

1921-77-R: Retail Clerks Union, Local 409 (Applicant) v. Macdonalds Consolidated Limited (Respondent).

Unit: “all those employees employed by Macdonalds Consolidated Limited in the City of Thunder Bay, Ontario who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foremen, office and sales staff and buyers.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

1938-77-R: United Steelworkers of America (Applicant) v. Kwik-Way Manufacturing of Canada Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

1947-77-R: Amalgamated Meat Cutters & Butcher Workmen of North America AFL CIO CLC (Applicant) v. Standard Brands Canada Limited (Respondent).

- and -

1948-77-R: Amalgamated Meat Cutters and Butcher Workmen of North America AFL CIO CLC (Applicant) v. Standard Brands Canada Limited (Respondent).

- and -

1949-77-R: Amalgamated Meat Cutters and Butcher Workmen of North America AFL CIO CLC (Applicant) v. Standard Brands Canada Limited (Respondent).

Unit: “all employees of Standard Brands Limited located at 672 Dupont Street and 306 Sackville Street in Metropolitan Toronto, Ontario, excluding foremen, all those above the rank of foreman, laboratory staff, office staff, sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (90 employees in the unit). (*Having regard to the agreement of the parties*).

1951-77-R: Canadian Union of Public Employees (Applicant) v. Commercial Caterers Limited (Respondent).

Unit: “all employees of the respondent in Toronto in True Davidson Nursing Home who are regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (12 employees in the unit).

1962-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Welton Limited (Respondent) v. Employee (Objectors).

Unit: “all construction labourers in the employ of the respondent on residential construction in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1964-77-R: Hotel and Motel and Restaurant Employees Union, Local 893, Atikokan, Ontario, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. John the Sportsman’s Restaurant Ltd. (Respondent).

Unit: “all employees of the respondent employed at its restaurant at Atikokan, Ontario, save and except manager and assistant manager.” (12 employees in the unit).

1966-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Parkway Construction (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

1972-77-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Beaver Foods Limited - Nutricare Division (Respondent).

Unit: “all employees of Beaver Foods Limited employed in the Dietary Department at Kincardine and District General Hospital, Kincardine, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except graduate dietitians, food supervisors, persons above the rank of food supervisor, head chef, office staff and persons covered by subsisting collective agreements between the parties.” (10 employees in the unit).

1973-77-R: Service Employees Union, Local 204, affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Clarke Institute of Psychiatry (Respondent).

Unit: “all employees of Clarke Institute of Psychiatry in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, under-graduate pharmacists, graduate dieticians, student dieticians, other graduate or undergraduate professional personnel, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, and persons covered by subsisting collective agreements.” (37 employees in the unit). (*Having regard to the agreement of the parties*).

1975-77-R: The Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Flamborough (Respondent).

Unit #1: “all arena and roads department employees of the Respondent in the Township of Flamborough, save and except office staff, arena managers, roads foremen and those above the rank of arena manager and roads foreman, persons not regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all arena and roads department employees of the Respondent in the Township of Flam-

borough who are normally employed for not more twenty-four (24) hours per week and all students employed during the school vacation period save and except office staff.” (35 employees in the unit). (*Having regard to the agreement of the parties*).

1990-77-R: Service Employees International Union, Local 183 AF of L., C.I.O., C.L.C. (Applicant) v. Extendicare Ltd./Peterborough (Respondent).

Unit: “all persons employed for not more than 22½ hours per week and all students employed during the school vacation period in the employ of Extendicare Ltd./Peterborough, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements.” (55 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note - see Report of full decision (1978) OLRB Rep. April*).

1991-77-R: Knechtel Employees’ Association (Applicant) v. Knechtel Wholesale Grocers Limited (Respondent).

Unit: “all Warehouse employees of the respondent, in the County of Waterloo.” (36 employees in the unit).

2003-77-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Van Horne Construction Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Having regard to the foregoing*).

2005-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Cadillac Fairview Corporation Limited (Respondent).

Unit: “all stationary engineers, operators and persons primarily engaged as their helpers employed by the respondent in its boiler room to the Fairview Mall at 1800 Sheppard Avenue East, Willowdale, Metropolitan Toronto, save and except Chief Engineer and persons above the rank of Chief Engineer.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

2008-77-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto save and except dispatchers, persons above the rank of dispatcher, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (57 employees in the unit). (*Having regard to the agreement of the parties*).

2009-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: “all employees of the respondent at Owen Sound, Ontario save and except dispatchers, persons

above the rank of dispatcher, office and sales staff.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

2010-77-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Hamilton-Wentworth (Respondent).

Unit: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week working at Wentworth Lodge in the Town of Dundas, save and except professional nursing staff, supervisors, persons above the rank of supervisor, office staff, technical staff, and students employed pursuant to a cooperative training programme.” (18 employees in the unit).

2024-77-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. Consolidated Sand & Gravel, Company, (A division of Standard Industries Ltd.) (Respondent) v. Cement Lime & Gypsum Workers (Intervener).

Unit: “all owner/operator truck drivers who are dependent contractors working at or out of the respondent’s pit at Pickering, Ontario, save and except dispatchers and persons above the rank of dispatcher, office and sales staff and persons covered by subsisting collective agreements.” (7 employees in the unit).

2026-77-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the Township of Lake of Bays (Respondent).

Unit: “all employees of the Road Department of The Corporation of the Township of Lake of Bays, save and except foremen, persons above the rank of foreman, office and technical staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (42 employees in the unit). (*Having regard to the agreement of the parties*).

0009-78-R: The Canadian Union of Public Employees (Applicant) v. The Lady Minto Hospital at Cochrane (Respondent).

Unit: “all the employees of The Lady Minto Hospital at Cochrane, Ontario, regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, department heads, persons above the rank of department heads, chief engineer and office and clerical staff.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

0010-78-R: Canadian Union of Public Employees (Applicant) v. The Children’s Aid Society of the City of Kingston and County of Frontenac (Incorporated) (Respondent).

Unit: “all employees of the respondent at its offices at Kingston and the County of Frontenac, save and except supervisors and persons above the rank of supervisor, the office manager and the secretary to the executive director.” (31 employees in the unit). (*Having regard to the agreement of the parties*).

0020-78-R: Service Employees International Union Local 183 AF of L., C.I.O., C.L.C. (Applicant) v. Belleville General Hospital (Respondent).

Unit: “all employees of Belleville General Hospital at Belleville, Ontario, save and except professional medical staff, physiotherapists, occupational therapists, psychologists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for more than twenty-four

hours per week, and all persons covered by subsisting collective agreements.” (132 employees in the unit). (*Having regard to the agreement of the parties*).

0027-78-R: Service Employees International Union - Local 183 AF of L., C.I.O., C.L.C. (Applicant) v. Medex Nursing Centre (Respondent).

Unit: “all persons regularly employed for not more than 22½ hours per week and all students employed during the school vacation period at its Medex Nursing Centre in Ottawa, save and except professional nursing staff, occupational therapists, physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

0030-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Blake Gascoyne Electric (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the foregoing*).

0033-78-R: Pattern Makers League of North America (Applicant) v. Benotto Model and Patterns Limited (Respondent).

Unit: “all pattern makers and apprentices employed by the respondent in the City of Windsor save and except foremen and persons above the rank of foreman.” (8 employees in the unit).

0043-78-R: The International Union of Bricklayers and Allied Craftsmen Local No. 4 (Applicant) v. Clermont St. Pierre, carrying on business as St. Pierre Masonry (Respondent).

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

0048-78-R: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Moris Building Systems Limited (Respondent).

Unit: “all carpenters, carpenters’ apprentices, construction labourers, ironworkers and ironworkers’ apprentices, sheetmetal workers and sheetmetal apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the foregoing, to the agreement of the parties*).

0102-78-R: The International Union of Bricklayers and Allied Craftsmen Local No. 4 (Applicant) v. Star Masonry Contractor (Respondent).

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*clarity note* - see Report of full decision (1978) OLRB Rep. April).

Applications Certified Subsequent to Pre-Hearing Vote

2097-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. John E. Smith Contracting Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervener #2).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the cities of Hamilton, Burlington and Brantford and the area adjacent thereto and the Counties of Halton, Wentworth, Brant, Norfolk, Haldimand, and the Townships of Caister, North and South Grimsby in the County of Lincoln, save and except plasterers and plasterers' apprentices employed on residential building projects, non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit). (*Having regard to the circumstances*).

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

BALLOT BOX SEALED

2144-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Bravo Cement Contracting Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent engaged in cement finishing work in the industrial, commercial and institutional sector in the Counties of Halton, Wentworth and Haldimand, and the Township of Caistor, North and South Grimsby in the County of Lincoln, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	1

1831-77-R: Canadian Chemical Workers Union (Applicant) v. The Exolon Company of Canada Limited (Respondent) v. Local 582 International Chemical Workers Union (Intervener).

Unit: "all employees of the Company at its plant in Thorold save and except General Office, Factory Office, Laboratory, Engineering, Stores and Security Personnel, Foremen and those above the rank of foreman." (223 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	227
Number of persons who cast ballots	192
Number of ballots marked in favour of applicant	188
Number of ballots marked in favour of intervener	4

1863-77-R: Canadian Chemical Workers' Union (Applicant) v. Domtar Inc. Domtar Chemical Group Sifto Salt Division, Evaporator Plant, Goderich, Ontario (Respondent).

Unit: "all employees of Sifto Salt Division (Evaporator Plant) Goderich, Ontario, save and except; (a) All office staff including clerical, sales, engineering, accounting and managerial; (b) Supervisory employees above and including the rank of foreman; (c) Chemical laboratory staff and assistants; (d) Shift Engineer and vacuum pan operators who are represented by the International Union of Operating Engineers Local 772 AFL-CIO; (e) All part-time and temporary employees engaged as such." (43 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots		41
Ballots segregated and not counted		41
Number of ballots marked in favour of applicant	39	
Number of ballots marked in favour of International Chemical Workers Union	2	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1266-77-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Belanger Construction Limited and B & B Enterprises (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1692-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. York Central Hospital (Respondent) v. Employee (Objector). (8 employees).

1730-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Transway Steel Buildings Ltd. (Respondent). (7 employees).

1880-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Northern Contracting & Transfer Co. (Respondent). (4 employees).

1933-77-R: Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Export Packers Company Limited (Respondent). (31 employees).

1994-77-R: London Ambulance Attendants' Association Local 4, Sault Ste. Marie (Applicant) v. Plummer Memorial Public Hospital (Respondent) v. Service Employees Union, Local 268 (Intervener). (31 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

2096-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Allied Acoustic Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervener #2) v. Hamilton Wall & Ceiling Contractors Association (Intervener #3).

Voting Constituency: "All plasterers and plasterers' apprentices including employees engaged in the application of sprayed asbestos, gypsum or liquid materials under any trade name for the purpose of fireproofing and in the application of one coat sprayed materials to drywall, block and concrete; the taping of all drywall applications; and in the application of all rigid insulation save and except non-working foremen and persons above the rank of non-working foreman in the Cities of Hamilton, Burlington and Brantford and in the area adjacent thereto and the Counties of Halton, Wentworth, Brant, Norfolk, Haldimand and the Townships of Caistor and North and South Grimsby in the County of Lincoln." (7 employees).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots		5
Ballots segregated and not counted		0
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener # 1	4	

0178-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Jamieson Drywall (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener).

Voting Constituency: "All plasterers and plasterers' apprentices in the employ of Jamieson Drywall including employees engaged in the application of sprayed asbestos, gypsum or liquid materials under any trade name for the purpose of fireproofing and in the application of one coat sprayed materials to drywall, block and concrete, the taping of all drywall applications; and in the application of all rigid insulation save and except non-working foremen and persons above the rank of non-working foreman in the Cities of Hamilton, Burlington and Brantford and the area adjacent thereto and the Counties of Halton, Wentworth, Brant, Norfolk, Haldimand and the Townships of Caistor, North and South Grimsby in the County of Lincoln." (2 employees).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	0	

1751-77-R: Canadian Union of Operating Engineers & General Workers Local 101 (Applicant) v. The Queen Elizabeth Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Voting Constituency: "All Stationary Engineers and persons primarily engaged as their Helpers, employed by the Queen Elizabeth Hospital in its boiler room at its Hospital 130 Dunn Ave. in Metropolitan Toronto, save and except Asst. Chief Engineer and those above the rank of Asst. Chief Engineer." (5 employees).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	3	

1840-77-R: Christian Labour Association of Canada (Applicant) v. J. A. V. Nursing Home Limited carrying on business as Beverly Hills Lodge Nursing Home (Respondent).

Voting Constituency: "All employees of the Respondent at Brantford, Ontario, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (35 employees).

Number of names of persons on revised voters list		33
Number of persons who cast ballots	31	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	25	

1896-77-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Doulton China of Canada Limited (Respondent).

Voting Constituency: "All employees of the respondent at Toronto, Ontario, save and except foremen and the senior administrative assistant and persons above the rank of foreman and senior administrative assistant, office and sales staff, and students employed during the school vacation period." (57 persons).

Number of names of persons on revised voters' list		56
Number of persons who cast ballots	55	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	38	

1929-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Avenue Structures (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (66 employees).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Ballots segregated and not counted	6	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	5	

Certification Dismissed Subsequent to Post-Hearing Vote

1144-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Flamingo Construction Limited and Desu Incorporated (Respondent) v. Employees (Objectors).

Unit: "all construction labourers employed on residential construction by Flamingo Construction Limited and Desu Incorporated in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers' non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Ballots segregated and not counted	4	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	4	

1768-77-R: International Association of Machinists and Aerospace Workers (Applicant) v. Algoma Truck and Tractor Sales Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Algoma Truck and Tractor Sales Limited and Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	10	

APPLICATIONS FOR CERTIFICATION WITHDRAWN.

1189-77-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Mancar Builders Inc. (Respondent) (17 employees).

1927-77-R: The Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Frill Seekers (Respondent). (2 employees).

1931-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. D Z Property Management Ltd., and/or Gaza Investments Limited, and/or Del Realty Incorporated, and/or Deltan Realty Limited (Respondents). (2 employees).

1979-77-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. Vanguard Floors Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener). (41 employees).

2002-77-R: The Federation of Teachers in Hebrew Schools (Applicant) v. The Board of Jewish Education (Respondent). (200 employees).

2011-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dafoe Mettallicrete Floor Co. Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) (15 employees).

2025-77-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. T. H. Forsythe Haulage Limited (Respondent). (12 employees).

0014-78-R: Teamsters Local Union No. 349, Aggregate Dump Truck Haulers and Allied Drivers of Ontario (Applicant) v. Consolidated Sand & Gravel, Company (Division of Standard Industries Ltd.) (Respondent). (7 employees).

0049-78-R: Cambridge Electrohome Salaried Employees' Association (Applicant) v. Electrohome Limited Industrial Products Division Cambridge, Ontario (Respondent). (61 employees).

APPLICATION UNDER SECTION 1(4).

1661-77-R: Canadian Union of Public Employees and its Local 1742 (Applicant) v. Birchcliff Nursing Homes Limited carrying on business as Chatelaine Villa Nursing Home, Dagmar Sobottka, carrying on business as Sunshine Canteen Services, Valerie Jayne Rice, A.K.A. Jayne or Joan Collins, carrying on business as Job-Care, and John Sobottka, carrying on business as John's Total Cleaning Services (Respondents). (*Withdrawn*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT.

1296-77-U: Canadian Union of Industrial Employees (Complainant) v. Reed Limited, Furniture Division (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0785-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 124, Ottawa - Hull (Respondent). (*Granted*).

1435-77-R: George Johnston and Others (Applicant) v Local 865, International Union of Operating Engineers (Respondent). (*Granted*).

Unit: "all stationary engineers and maintenance men employed by the employer at its business location on Lillie Street in the City of Thunder Bay." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		8
Number of ballots marked in favour of respondent	0	
Number of ballots marked against of respondent	8	

1650-77-R: Hsing Kum Chen (Applicant) v. Lodge 2243 - District Lodge 717 - International Association of Machinists and Aerospace Workers (Respondent) v. Manfred Kapp for ATM Industries Limited (Intervener). (*Dismissed*).

Unit: "all employees of the respondent in the County of Peel, save and except foremen, persons above the rank of foreman, and office staff." (15 employees in the unit).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots		14
Number of ballots marked in favour of Respondent	7	
Number of ballots marked against of Respondent	7	

1883-77-R: Mrs. Sheila Ryan (Applicant) v. Canadian Union of Public Employees 2197 Riverside Drive, Suite B-12 Ottawa, Ontario (Respondent). (00 employees). (*Dismissed*).

1940-77-R: Michael Corbeil, Robert Church and Michael P. MacDonald (Applicant) v. Teamsters Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (5 employees). (*Granted*).

1996-77-R: Michael J. Dietrich (Applicant) v. Sheet Metal Workers International Association, Local Union No. 562 (Respondent). (6 employees). (*Dismissed*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS.

1882-77-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Canadian Labour Congress Federal Local No. 1632 (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL.

1715-77-U: Canteen of Canada Ltd. (Applicant) v. Kenneth Bates, John Schraa, and Malcolm MacIntyre and Retail, Wholesale and Department Store Union and its Local 414 and Michael Danyluk (Respondent). (*Withdrawn*).

0073-78-U: Trans Western Express Company (Applicant) v. Teamsters Union Local 938, Affiliated with Teamsters, Chauffeurs, Warehousemen and Helpers of America, J. White, H. Neil, A. Davis et al (See Schedule 'A'), L. Gonder et al (See Schedule 'B'), W. Lloyd et al (See Schedule 'C') (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL.

1058-76-U: Labourers' International Union of North America, Local 183 (Applicant) v. A. & C. Khan Janitorial Services Limited Gaza Investments Limited, Gaza Investments Limited carrying on business as Tuxedo Court Apartments, Del Realty Incorporated, Barry Hastey and Audrey Adams (Respondents). (*Withdrawn*).

1895-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. A.C. Khan Janitorial Services Ltd., A & C Janitorial Services Limited, A. & C. Management Services, A C Khan Janitorial Service, A.C. Maintenance Service Ltd. A. & C. Khan Janitorial Services Limited, Gaza Investments Limited, Gaza Investments Limited carrying on business as Tuxedo Court Apartments, Del Realty Incorporated, D. Z. Property Management Limited, Deltan Realty Limited, Ackbar Khan, Dorothy Fenton, and David Bertrand (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE.

0381-77-U: Labourers' International Union of North America, Local 493 (Applicant) v. Municipality of Casimir, Jennings & Appleby (Respondent). (*Dismissed*).

1247-77-U: Labourers' International Union of North America, Local 1036 (Applicant) v. Mancar Builders Incorporated, Tony Lambert and Vic Segato (Respondent). (*Withdrawn*).

1717-77-U: Canteen of Canada Ltd. (Applicant) v. Kenneth Bates, Malcolm MacIntyre, John Schraa (Respondent). (*Withdrawn*).

1748-77-U: United Brotherhood of Carpenters and Joiners of America, Local Union 2679 (Applicant) v. Whitby Boat Works Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0380-77-U: Labourers' International Union of North America, Local 493 (Complainant) v. Municipality of Casimir, Jennings & Appleby (Respondent). (*Dismissed*).

0414-77-U: Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Oakwood Hotel (Toronto) Ltd. (Respondent). (*Withdrawn*).

1248-77-U: Labourers' International Union of North America, Local 1036 (Complainant) v. Mancar Builders Incorporated, Tony Lamberto and Vic Sacato (Respondents). (*Withdrawn*).

1305-77-U: Peter A. Gregoroff (Complainant) v. 1. Wicket & Craig Limited, Toronto, Ontario. 2. The Ontario Council of Leather Workers and The Canadian Food and Allied Workers chartered by The Amalgamated Meat Cutters & Butcher Workmen of North America, Local 116-L (Respondents). (*Withdrawn*).

1479-77-U: Canadian Union of Public Employees and its Local 1742 (Complainant) v. Birchcliff Nursing Homes Limited carrying on business as Chatelaine Villa Nursing Home (Respondent). (*Withdrawn*).

1557-77-U: The United Plant Guard Workers of America, Local 1962 (Complainant) v. Olympia and York Developments Limited (Respondent). (*Dismissed*).

1593-77-U: The United Plant Guard Workers of America, Local 1962 (Complainant) v. Olympia and York Developments Limited (Respondent). (*Dismissed*).

1630-77-U: Ron Carl Boyce (Complainant) v. The Canadian Union of Public Employees Local #1196 (Respondent). (*Dismissed*).

1665-77-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and

Restaurant Employees and Bartenders' International Union. A.F.L.-C.I.O.-C.L.C. (Complainant) v. The New Gregory House Inc. (Respondent). (*Withdrawn*).

1737-77-U: United Steelworkers of America (Complainant) v. Gardette Limited (Respondent). (*Withdrawn*).

1737-77-U: International Union of Doll & Toy Workers of the U.S.A. & Canada, Local 905 (Complainant) v. Coles Book Stores Limited (Respondent). (*Terminated*).

1753-77-U: Teamsters Union Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. National Socket Screw Manufacturing Limited (Respondent). (*Withdrawn*).

1786-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. New Gregory House Inc. (Respondent). (*Withdrawn*).

1803-77-U: Walter Clement Sarich (Complainant) v. The Corporation of the City of Sault Ste. Marie (Respondent). (*Granted*).

1834-77-U: United Garment Workers of America (Complainant) v. The Bell Shirt Company Limited (Respondent). (*Granted*).

1866-77-U: Retail Clerks Union, Local 1977 chartered by the Retail Clerks International Union (Complainant) v. Zehrs Markets Division of Zehrmart Limited (Respondent). (*Withdrawn*).

1977-77-U: United Brotherhood of Carpenters of America. AFL-CIO-CLC (Complainant) v. Viceroy Construction Company Limited (Respondent). (*Withdrawn*).

1983-77-U: Ontario Nurses' Association (Complainant) v. St. Thomas-Elgin General Hospital (Respondent). (*Withdrawn*).

1998-77-U: Yvon Cere (Complainant) v. Amalgamated Transit Union Division 279 (Respondent). (*Withdrawn*).

2014-77-U: United Brotherhood of Carpenters and Joiners of America, AFL, CIO-CLC (Complainant) v. Viceroy Construction Company Limited (Respondent). (*Withdrawn*).

0007-78-U: London and District Service Workers' Union, Local 220 (Complainant) v. Trillium Villa Nursing Home (Respondent). (*Withdrawn*).

0024-78-U: Robert Parcels (Complainant) v. Local 4927 United Steelworkers of America (Respondent). (*Withdrawn*).

0066-78-U: Canadian Union of Public Employees (Complainant) v. Travelways School Transit - Maple Leaf Coach Lines (Respondent). (*Withdrawn*).

0067-78-U: Bettie Coulas (Complainant) v. Retail Clerks Int'l. Union (Respondent). (*Withdrawn*).

0103-78-U: Elsie Nidd (Complainant) v. Queensway General Hospital Canadian Union of Public Employees (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT.

1914-77-M: The Canada Starch Company Limited (Applicant) v. United Food Processors Union, Local 483, AFL, CIO, CLC (Respondent). (*Granted*).

APPLICATION UNDER SECTION 55.

1961-77-R: Local Union 785 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bach-McDougall Engineers & Contractors Limited and W. A. McDougall Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1348-77-M: Canadian Union of Public Employees Local 4 (Applicant) v. The Public Utilities Commission of the Town of Ingersoll (Respondent).

1660-77-M: Canadian Union of Public Employees, Local Union 1281 (Trade Union) v. Graduate Students' Union (Employer). (*Terminated*).

APPLICATIONS UNDER SECTION 112A.

1137-77-M: Ontario Allied Construction Trades Council (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents). (*Dismissed*).

1474-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Val Ros Construction Ltd. (Respondent). (*Withdrawn*).

1520-77-M: Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. Sudbury Electrical Contractors Association (S.E.C.A.) and M. G. Burke Investments Ltd. (Respondents). (*Granted*).

1542-77-M: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Advance Carpentry Inc. (Respondent).

- and -

1790-77-M: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Advance Carpentry Inc. (Respondent). (*Granted*).

1711-77-M: Christian Labour Association of Canada (Applicant) v. Crown Electric owned and operated by Crowle Electrical Ltd. (Respondent). (*Dismissed*).

1889-77-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 298 (Applicant) v. Marini Bros. Plastering (1976) Co. Ltd. (Respondent). (*Directed*).

1890-77-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 298 (Applicant) v. Piersanti Plastering Company Limited (Respondent). (*Withdrawn*).

1891-77-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 298 (Applicant) v. Santucci Bros. Limited (Respondent). (*Direction*).

1953-77-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Arthur G. McKee & Company of Canada Ltd. (Respondent). (*Dismissed*).

1982-77-M: Local Union 2965, The Resilient Floor Workers, United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O. (Applicant) v. Darling Carpet Installations (Respondent). (*Withdrawn*).

1984-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Leeds Richardson Co. (Respondent). (*Withdrawn*).

1986-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Leeds Richardson Co. (Respondent). (*Withdrawn*).

0011-78-M: International Union of Operating Engineers, Local 793 (Applicant) v. W. C. Pietz Limited (Respondent). (*Withdrawn*).

0015-78-M: United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada Local Union 46 (Applicant) v. (1) Globo Plumbing Ltd., (2) The Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION.

1651-77-R: Pharmacists and Professional Employees Association, Local 1976, Chartered by Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Madoc Manor Lodge and Retirement Home (Respondent). (*Request Denied*).



Labour
Relations Board

Ontario

20N

354

Decisions June 78

Governance
Publication



ONTARIO LABOUR RELATIONS BOARD

Chairman D.D. CARTER

Alternate Chairman RORY F. EGAN

Vice-Chairmen G.G. BRENT
K.M. BURKETT
E. NORRIS DAVIS
R.A. FURNESS
A.L. HALADNER
M.G. PICHER
P.C. PICHER
N. SATTERFIELD
I.C.A. SPRINGATE

Members H.J.F. ADE
D.B. ARCHER
J.D. BELL
C. GORDON BOURNE
E. BOYER
M. FENWICK
A. GRIBBEN
A. HERSHKOVITZ
O. HODGES
R.D. JOYCE
F. KEAN
F.W. MURRAY
P.J. O'KEEFFE
R. REDFORD
W.F. RUTHERFORD
H. SIMON
W.H. WIGHTMAN

Director S.D. SAXE

Registrar D.K. AYNSLEY

Solicitor R.O. MACDOWELL

Editor, Monthly Report R.O. MACDOWELL

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1978] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

CASES REPORTED

A.N. Shaw Restoration Ltd., Re Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 127	479
Beckett Elevator Company Limited, Re International Union of Elevator Constructors, Local 96	485
Bricklayers, Masons Independent Union of Canada, Local 1, Re Toronto Building and Construction Trades Council	494
Cable Tech Wire Company Limited, Re I.B.E.W.	496
Canadian Chemical Workers' Union, Local 28, Re I.C.W.U.	499
Canadian General Electric Company Limited, Re United Steelworkers, U.E., et al	501
Municipality of Casimir, Jennings & Appleby, Re Labourers International Union of North America, Local 493	507
Commercial Shearing Ltd., Re T.W. Shields	520
Connolly Contractors Limited, Re Labourers' International Union of North America, Local 1081, et al	524
Coons Heating & Sheet Metal Limited, Re Christian Labour Association of Canada	525
D.L. Stephens Contracting Niagara Limited and Stephens & Bass Limited, Re C.L.A.C., United Brotherhood of Carpenters and Joiners of America, Local Union 38	531
Dufferin Aggregates A Division of Dufferin Materials & Construction Ltd., Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers	533
Ellwall and Sons Construction Limited, Re Labourers' International Union of North America, Local 506	535
ESB Canada Limited, Re Eric Gladish	538
The Explorer Inns, Limited, Re Hotel & Restaurant Employees Union, Local 756, St. Catharines, Ontario	541
Calvin W. Goldbeck, Re Sheet Metal Workers' International Association, Local Union 562	543
M.G. Burke Investments Ltd., Re Barry Polkinghorne, I.B.E.W. et al	549
Ontario Hydro, Re I.B.E.W.	552
Racine, Robert and Gauthier Reg'd, Re Office & Professional Employees International Union	559
Riverside Roofing Limited, Re Chatham Construction Workers Association, Sheet Metal Workers' International Association, et al	567

II

Sandra Instant Coffee Company Limited, Re Bakery & Confectionery Workers' Union . . .	569
Stewart & Hinan Contractors Limited, Re United Steel Workers, et al	574
Victoria Hospital Corporation, Re London and District Service Workers' Union, Hero Werkman, et al	579

INDEX OF CASES

- Arbitration – Section 112a – Whether certain sums received by employees must be included in earnings for purposes of calculating vacation pay
 INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96, v. BECKETT ELEVATOR COMPANY LIMITED 485
- Arbitration – Section 112a – Whether employees entitled to holiday pay for days not worked
 LOCAL UNION 1788 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. ONTARIO HYDRO 552
- Bargaining Unit – Certification – Construction Industry – Bargaining Unit – Board refused to sever one geographic area from an existing province wide bargaining structure
 LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1081, v. CONNOLLY CONTRACTORS LIMITED v. ONTARIO PROVINCIAL CONFERENCE I.U.B.A.C. 524
- Buildup – Certification – Buildup – Representation Vote – Application involving fluctuating work force composed of owner drivers – Board deferred vote to a time when representative group would be employed
 CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS v. DUFFERIN AGGREGATES A DIVISION OF DUFFERIN MATERIALS & CONSTRUCTION LTD 533
- Certification – Buildup – Representation Vote – Application involving fluctuating work force composed of owner drivers – Board deferred vote to a time when representative group would be employed
 CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS v. DUFFERIN AGGREGATES A DIVISION OF DUFFERIN MATERIALS & CONSTRUCTION LTD 533
- Certification – Charges – Practice and Procedure – Board refusing to hear late allegations of improper or irregular conduct
 LOCAL 1590, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. CABLE TECH WIRE COMPANY LIMITED, v. GROUP OF EMPLOYEES 496
- Certification – Construction Industry – Bargaining Unit – Board refused to sever one geographic area from an existing province wide bargaining structure
 LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1081, v. CONNOLLY CONTRACTORS LIMITED, v. ONTARIO PROVINCIAL CONFERENCE I.U.B.A.C. 524
- Certification – Construction Industry – Collective Agreement – Board held that the transition provisions plugging the parties into the province wide bargaining scheme on the expiration of their existing agreements could not operate as a bar to an otherwise timely certification application

CHATHAM CONSTRUCTION WORKERS ASSOCIATION, LOCAL NO. 53, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA, v. RIVERSIDE ROOFING LIMITED, v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 235	567
Certification – Interference with trade union – Employer influencing employees to join applicant union – certificate revoked	
CHRISTIAN LABOUR ASSOCIATION OF CANADA v. COONS HEATING & SHEET METAL LIMITED	525
Certification – Membership Evidence – Practice and Procedure – Union submitting cards in name of local and international – Board refusing to allow evidence to vary or amend cards to show that all were intended to be in the name of the local	
HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL 756, ST. CATHARINES, ONTARIO and THE EXPLORER INNS, LIMITED, and GROUP OF EMPLOYEES	541
Charges – Certification – Practice and Procedure – Board refusing to hear late allegations of improper or irregular conduct	
LOCAL 1590, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. CABLE TECH WIRE COMPANY LIMITED, v. GROUP OF EMPLOYEES	496
Collective Agreement – Certification – Construction Industry – Collective Agreement – Board held that the transition provisions plugging the parties into the province wide bargaining scheme on the expiration of their existing agreements could not operate as a bar to an otherwise timely certification application	
CHATHAM CONSTRUCTION WORKERS ASSOCIATION, LOCAL NO. 53, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA, v. RIVERSIDE ROOFING LIMITED, v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 235	567
Construction Industry – Certification – Bargaining Unit – Board refused to sever one geographic area from an existing province wide bargaining structure	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1081, v. CONNOLLY CONTRACTORS LIMITED, v. ONTARIO PROVINCIAL CONFERENCE ILU.B.A.C	524
Construction Industry – Certification – Collective Agreement – Board held that the transition provisions plugging the parties into the province wide bargaining scheme on the expiration of their existing agreements could not operate as a bar to an otherwise timely certification application	
CHATHAM CONSTRUCTION WORKERS ASSOCIATION, LOCAL NO. 53, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA, v. RIVERSIDE ROOFING LIMITED, v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 235	567
Discharge for Union Activity – S-79 – Duty to Bargain in Good Faith – Employer agreeing to reinstate discharged employees who have not been convicted of criminal offence – Employees receiving conditional discharge but not “convicted” – No requirement to reinstate until employees fulfill the condition	

BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 264, v. SANDRA INSTANT COFFEE COMPANY LIMITED	569
Duty to Bargain in Good Faith – S-79 – Discharge for Union Activity – Employer agreeing to reinstate discharged employees who have not been convicted of criminal offence – Employees receiving conditional discharge but not “convicted” – No requirement to reinstate until employees fulfill the condition	
BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 264, v. SANDRA INSTANT COFFEE COMPANY LIMITED	569
Duty to Bargain in Good Faith – S-79 – Good Faith – Parties reaching agreement after protracted negotiations – Employer refusing to execute agreement initially while seeking reconsideration of certificate and subsequently while seeking judicial review – Employer unilaterally implementing terms – Board finding bad faith and ordering execution of agreement	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493, v. MUNICIPALITY OF CASIMIR, JENNINGS & APPLEBY	507
Financial Statements – Whether union member entitled to financial information concerning employer run pension plan – Required form of disclosure restricted to funds administered by trade union exclusively or jointly with employer	
ERIC GLADISH v. ESB CANADA LIMITED	538
Health and Safety – Employee refusing to perform work alleged to be unsafe – Board found no reasonable cause for such belief	
T. W. SHIELDS v. COMMERCIAL SHEARING LTD	520
Interference with trade union – Certification – Employer influencing employees to join applicant union – certificate revoked	
CHRISTIAN LABOUR ASSOCIATION OF CANADA v. COONS HEATING & SHEET METAL LIMITED	525
Jurisdictional Dispute – Respondent discussing no sub-contracting arrangement with employer organization – complainant alleging that arrangement, if concluded, would restrict future access to work and require assignment of work to other trade union – No present or existing dispute concerning work assignment – application held premature	
BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1, v. TORONTO BUILDING AND CONSTRUCTION TRADES COUNCIL	494
Membership Evidence – Certification – Practice and Procedure – Union submitting cards in name of local and international – Board refusing to allow evidence to vary or amend cards to show that all were intended to be in the name of the local	
HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL 756, ST. CATHARINES, ONTARIO and THE EXPLORER INNS, LIMITED, and GROUP OF EMPLOYEES	541
Practice and Procedure – Certification – Charges – Practice and Procedure – Board refusing to hear late allegations of improper or irregular conduct	

LOCAL 1590, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. CABLE TECH WIRE COMPANY LIMITED, v. GROUP OF EMPLOYEES	496
Practice and Procedure – Certification – Membership Evidence – Union submitting cards in name of local and international – Board refusing to allow evidence to vary or amend cards to show that all were intended to be in the name of the local	
HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL 756, ST. CATHARINES, ONTARIO and THE EXPLORER INNS, LIMITED, and GROUP OF EMPLOYEES	541
Practice and Procedure – Termination – Whether following dismissal of earlier application a new application should be entertained.	
CALVIN W. GOLBECK v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 562	543
Practice and Procedure – Union failure to supply particulars of misconduct – Reverse onus provision does not modify obligation to supply particulars – complaint adjourned on terms that complainant pay respondent's expenses for the day	
OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION v. RACINE, ROBERT AND GAUTHIER REG'D	559
Related Employer – Associated companies under common direction in existence for many years and organized by separate unions – Board declined to make related employer declaration	
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 38, v. D.L. STEPHENS CONTRACTING NIAGARA LIMITED AND STEPHENS & BASS LIMITED	531
Related Employer – Employer operating parallel business for some years – No attempt by union to organize employees – No dispute concerning common ownership and control – Board declining to exercise discretion to make declaration	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, v. ELLWALL AND SONS CONSTRUCTION LIMITED	535
Religious Objectors – Employee becoming bound by agreement as a result of amalgamation of hospitals – Employee entitled to exemption from union security provisions of subsisting agreement	
HERO WERKMAN v. LONDON AND DISTRICT SERVICE WORKERS' UNION LOCAL 220, v. VICTORIA HOSPITAL CORPORATION	579
Representation Vote – Certification – Buildup – Application involving fluctuating work force composed of owner drivers – Board deferred vote to a time when representative group would be employed	
CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS v. DUFFERIN AGGREGATES A DIVISION OF DUFFERIN MATERIALS & CONSTRUCTION LTD	533

Sale of a Business – Following merger employer entering into collective agreements with union – agreements containing conflicting recognition provisions respecting intermingled employees – problems not amenable to resolution under section 55 since they arose from the agreements not the merger – application dismissed	
CANADIAN APPLIANCE MANUFACTURING CO. LIMITED v. UNITED STEELWORKERS OF AMERICA, v. UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), v. CANADIAN GENERAL ELECTRIC COMPANY LIMITED	501
S-79 – Discharge for Union Activity – Duty to Bargain in Good Faith – Employer agreeing to reinstate discharged employees who have not been convicted of criminal offence – Employees receiving conditional discharge but not “convicted” – No requirement to reinstate until employees fulfill the condition	
BAKERY & CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 264, v. SANDRA INSTANT COFFEE COMPANY LIMITED	569
S-79 – Duty to Bargain in Good Faith – Parties reaching agreement after protracted negotiations – Employer refusing to execute agreement initially while seeking reconsideration of certificate and subsequently while seeking judicial review – Employer unilaterally implementing terms – Board finding bad faith and ordering execution of agreement	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493, v. MUNICIPALITY OF CASIMIR, JENNINGS & APPLEBY	507
S-79 – Union consenting to violation of work assignment provisions of agreement – Union concession found to create a privilege for the employer which could not be revoked during the freeze period	
A.N. SHAW RESTORATION LTD. v. OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL UNION NO. 127	479
Section 112a – Arbitration – Whether certain sums received by employees must be included in earning for purposes of calculating vacation pay	
INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96, v. BECKETT ELEVATOR COMPANY LIMITED	485
Section 112a – Arbitration – Whether employees entitled to holiday pay for days not worked	
LOCAL UNION 1788 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. ONTARIO HYDRO	552
Strike – Employees engaged in primary picketing in connection with a lawful strike – Employees of ‘subcontractors refusing to cross picket line – Cease and desist direction available to end unlawful strike involving concerted refusal to cross picket line but no order made or possible concerning the picketing	
STEWART & HINAN CONTRACTORS LIMITED v. UNITED STEELWORKERS OF AMERICA, LOCAL 13173, AND MR. KEN ASHTON	574
Termination – Practice and Procedure – Whether following dismissal of earlier application a new application should be entertained	

CALVIN W. GÖLBECK v. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 562	543
Termination – Timeliness – Letter of intention to terminate received by Board in open period – Letter containing all necessary information – Application treated as timely despite failure to use prescribed form	
BARRY POLKINGHORNE and LOCAL UNION 1687, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND M.G. BURKE INVESTMENTS LTD	549
Timeliness – Termination – Letter of intention to terminate received by Board in open period – Letter containing all necessary information – Application treated as timely despite failure to use prescribed form	
BARRY POLKINGHORNE AND LOCAL UNION 1687, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND M.G. BURKE INVESTMENTS LTD	549
Trusteeship – Application for continuation of trusteeship made following the expiration of one year – Whether Board can permit extension of trusteeship term – Board granted consent to extension	
INTERNATIONAL CHEMICAL WORKERS' UNION, v. CANADIAN CHEMICAL WORKERS' UNION, LOCAL 28	499

NOTICE OF CHANGE TO PRACTICE NOTE NUMBER 4.

Parties appearing before the Board are advised that the Board has amended Practice Note No. 4 concerning the procedure to be followed on a Labour Relations Officer's enquiry into the duties and responsibilities of persons whose status is in issue. The existing paragraph 8 should be deleted and the following substituted:

8. In a case where a Labour Relations Officer is inquiring into the duties and responsibilities of an occupational classification and there is more than one person in the classification, the parties may agree that the evidence of one person or a number of persons in the classification is representative of the duties and responsibilities of all persons in the classification. Where the parties are unable to agree to one person, or a number of persons, as being representative of all persons in the classification, the Labour Relations Officer shall advise the parties that an interim report may be issued to the Board before all persons in the classification have been examined. Such a report shall not be issued until the Officer has given the parties the opportunity to adduce evidence regarding all persons already examined. Where an interim report is prepared, a copy of the report will be served to all parties. The parties shall then be given the opportunity to make representations to the Board as to whether it is necessary to examine all persons in the classification. The Board shall hold such hearings, make such decisions, and issue such instructions as it considers appropriate in the circumstances.

0242-78-U A.N. Shaw Restoration Ltd., (Complainant), v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 127, (Respondent).

S-79 – Union consenting to violation of work assignment provisions of agreement – Union concession found to create a privilege for the employer which could not be revoked during the freeze period

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W. Gibson and O. Hodges.

APPEARANCES: *W.G. Phelps, P. Baggaley, Andy Hannigan and Joe Goodwin for the applicant; Joseph J. Petricevic and H. Kinsley for the respondent.*

DECISION OF THE BOARD: June 19, 1978

1. This is a complaint filed under section 79 of the Act alleging a violation of Section 70(1) of the Act.

2. Section 70(1) of the Act provides:

“70. (1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.”

3. In the instant case notice to bargain was served for renewal of a collective agreement which expired on April 30, 1978. It follows from these facts that the statutory freeze

created by section 70(1) of the Act came into effect on May 1, 1978 and will remain in effect until the conditions set out in either section 70(1)(a) or (b) have been met.

4. This case involves the application of Article 4(a) of the aforementioned collective agreement between the parties. Article 4(a) provides:

“It is agreed that only members in good standing with this Union will be employed on work coming within the scope of this Agreement. The Employer agrees that when hiring employees for any classification covered by this Agreement that before hiring such employees, he will inform the Union of his requirements in order to permit the Union an opportunity to furnish such employees. Employees shall not be allowed to commence work if he is not in possession of a referral slip issued by the Union. In the event it is not feasible to issue a referral slip to an employee before he commences work, the Rep. of the Union will issue same by mail or other means.”

The clause requires firstly that only members in good standing with the union be employed, secondly that the company inform the union before hiring in order to permit the union first opportunity to furnish employees and thirdly, that employees not be allowed to commence work if not in possession of a referral slip. The issue before the Board relates to the attempt by the trade union to enforce strict compliance with the second and third requirements of article 4(a) as set-out above. The employer takes the position that the union, having allowed it the privilege of conducting its hiring practices other than in accord with the second and third requirements of article 4(a), cannot require strict compliance as of May 2, 1978, the day following the commencement of the statutory freeze. There is no dispute that the first requirement has been enforced by the union and continues into the freeze period.

5. The evidence establishes that the clause in question was first inserted into the collective agreement between the parties in 1972. The evidence further establishes, however, that in December of 1972 the use of referral slips was raised at a general union meeting and the members voted to discontinue the practice as unworkable. Mr. J. Goodwin, the business manager of the local union from January, 1973 to December, 1976, and now an employee of A.N. Shaw, testified that referral slips were never required by the union while he was its business manager. His evidence is consistent with that of Mr. Petricevic, the present business manager, who testified that he did not order the printing of referral slips until December of 1977. Mr. Goodwin further testified that when he was business manager of the union the company was not required to contact the union before hiring. The evidence of the company officials was that the company has never been required to notify the union before hiring but rather has hired without notice to the union other than when it was unable to hire and required union referrals. The Board notes that the union president, who was present at the hearing but was not called to testify, is an employee of A.N. Shaw and was an employee of A.N. Shaw throughout the relevant period. The evidence establishes that in 1978 the company continued to hire without first going to the union and without requiring union referral slips. The company notified Mr. Petricevic on April 13, 1978 of the employees it had already hired for the 1978 season and the dates of their hire. Prior to April 30th Mr. Petricevic supplied the company with a list of the company's employees who were paid-up members of the union. The Board views the forwarding of this list by Mr. Petricevic as a means of facilitating compliance with the first requirement of article 4(a) i.e., that only members in good standing be employed.

6. Mr. Petricevic forwarded the following letter to the company which is dated May 2, 1978:

“Enclosed please find Referral Permits for the member-employees which you have recalled back to work on 4/24/78 and on 5/1/78. To date we have been notified by you that there are 39 member-employees recalled. We appreciate you notifying us of the recalls however, as previously noted such practice is in violation of Article 4(a).

We request that you comply with the terms of the Collective Agreement in particular Article 4(a). Please be advised that some of the members you have recalled and employed without first obtaining a referral permit are not in good standing.

We strongly urge compliance with Article 4(a) so that members who are not in good standing at the time of recall have the opportunity to bring themselves in good standing when obtaining their Referral Permit.

...

I trust you find the foregoing in order.”

There can be no question that this letter serves to put the company on notice as of May 2nd that the union requires strict compliance with article 4(a) of the agreement. A number of referral slips for persons already hired by the company were enclosed with the letter. Mr. Petricevic admitted that these slips were not solicited by the company and that they were the first referral slips supplied to the company since he became business manager in August, 1977.

7. Mr. Petricevic testified that following his appointment as business manager he notified the company by letter dated October 13, 1977 that he expected compliance with the collective agreement. The letter of October 13 notes that the company is in violation of article 4, sections (a), (b), (c) and (d). The letter does not specifically refer to the referral slip system or the union's right to the first opportunity to supply employees. It does, however, deal specifically with alleged breaches of Article 26, sections (a), (b), (c) and (d) and Article 4 sections (b) and (c). Counsel for the company asked Mr. Petricevic in cross-examination if the October 13th letter was intended to deal with the failure of the company to pay the required dues, welfare payments etc. and to forward the names of new employees to the union. Mr. Petricevic replied that at the time he was naive enough to think that the company was complying with the requirement to afford the union the first opportunity to supply employees. The Board has difficulty with Mr. Petricevic's evidence on this point in that it is clear on the face of the letter that the company had recently hired 18 employees without first going to the union. In any event, Mr. Petricevic admitted that at a meeting of the benefit fund trustees and the company on October 23, 1977 all of the matters which were raised in the letter of October 13, 1977 were resolved. The question of referral slips and the union's entitlement to the first opportunity to supply men were not dealt with at the October 23rd meeting. The Board has no hesitation in finding that the letter of October 13, 1977 did not put the company on notice, nor was it intended to put the company on notice that

henceforth the union required strict compliance with the second and third requirements of article 4(a).

8. There is no evidence before the Board to support the conclusion that during the intervening months (October 13, 1977 to April 30, 1978) the company was ever put on notice by the union that it intended to strictly enforce its rights in respect of the second and third requirements of article 4(a). To the contrary, the company notified the union on April 13, 1978 of the names of persons it had hired without first contacting the union and without requiring referral slips. The union did not grieve or request the company to cease and desist but rather, it forwarded a list to the company showing the names of those employees hired by the company who were paid-up members of the union. The Board is satisfied that the union forwarded the above list for the purpose of facilitating compliance with the first requirement of article 4(a). There is no doubt that throughout this period the trade union had made a concession to the employer which, having regard to the terms of the agreement, it was not required to do. It was not until after April 30th that the union put the company on notice that it intended to rely on its express rights, and withdraw the concession.

9. It has long been held by this Board that the purpose of the Section 70(1) freeze, which maintains the status quo in respect of "wages or any other term or condition of employment or any right, privilege or duty," is to facilitate the bargaining process by providing a fixed point of departure and a period of tranquility and stability in which to commence and hopefully conclude negotiations for a collective agreement. (See re *Canadian General Electric Company Limited* [1965] OLRB Rep. Dec. 649, *Ottawa General Hospital*, [1972] OLRB Rep. June 681, *Canron Ltd, Eastern Structural Division*, [1976] OLRB Rep. Aug. 436 and *Carleton University* case, February 13, 1978, as yet unreported.) The task which confronts the Board in these matters, therefore, is to determine the component elements of the status quo as of the date the statutory freeze took effect and to assess the change or alteration which is complained of against this fixed point of departure.

10. Although article 4(a) of the expired collective agreement establishes the right of the union to be given the first opportunity to supply employees and the right to require that no one be allowed to work unless in possession of a referral slip, the evidence establishes that in the six year period preceding the expiry of the previous collective agreement the union had never enforced its rights in this regard and had knowingly allowed the company to disregard the second and third requirements of article 4(a) and establish hiring practices which were contrary to those stipulated in article 4(a). The Board is satisfied that if the union had sought by way of arbitration to enforce the relevant provisions of Article 4(a) as of April 30, 1978, it would not have been able to do so without first having served the company with notice of its intent in this regard. No such notice was served upon the company prior to April 30, 1978. The conduct of the union in the six year period prior to April 30, 1978 and the company's reliance on that conduct at considerable risk to itself (see re *Blouin Drywall*, (1973) 4 LAC (2d) 254 O'Shea) would have served to bar, by way of promissory estoppel any attempt by the union to have asserted its rights prior to April 30, 1978 in respect of the referral system and its entitlement to the first opportunity to supply labour. (See re *Canadian Labour Arbitration*, Brown and Beatty, Canada Law Book Limited 1977 at pages 66-71.

11. The union asserts that the section 70 freeze does not stop it from asserting its rights as embodied in the expired collective agreement. The Board accepts this argument in

so far as it applies to express rights which are enforceable as of the commencement of the freeze. The Board held in the *Molson's Brewery (Ontario Limited, Toronto)* case [1977] OLRB Rep. Aug. 526 that an express right contained in a collective agreement is an incident of the collective bargaining relationship which is continued after the expiry of the agreement. The Board found in that case that the express right of the employer to schedule work continued after the expiry of the agreement and into the freeze period. The Board was careful to state in the *Molson's* case, that there was nothing before it to indicate that the company had led the union to rely to its detriment on any express or implied assertion on its part that it would not be relying on its right to schedule. In other words, there was no evidence to support a finding, in the face of the express right, that the reasonable expectation of the parties was that the right would not be exercised. The instant case is clearly distinguishable from the *Molson's* case in that the right which the union seeks to assert in the freeze period is one which it could not have asserted at the expiry of the agreement. The Board has found on the evidence that the union would have been estopped from asserting its rights in respect of the second and third requirement of article 4(a) without first having put the company on notice of its intent. In the instant case the reasonable expectation was that the right would not be exercised, and the benefit previously enjoyed by the employer would continue.

12. Section 70(1) is not framed in terms of maintaining the collective agreement, but rather, it freezes "terms and conditions of employment, or any right, privilege or duty." Although the terms and conditions of employment and the respective rights of the parties as set-out in the collective agreement will in most cases be carried forward into the freeze period, the legislature has recognized that the full extent of the day to day relationship is not necessarily found within the four corners of the collective agreement. Many incidents of an on-going relationship are not codified and indeed, aspects of the relationship which are codified may nevertheless be carried on in a manner inconsistent with the written word. It is evident from a reading of Section 70(1) and indeed it is consistent with its purpose, that it be construed as freezing the total relationship and not simply the terms of the written document. The Board, therefore, in deciding if the action complained of alters the status quo must look to the total relationship including but not confined to the terms set out in the collective agreement.

13. In the recent *Hydro Electric Commission of the City of Mississauga* case, [1977] OLRB Rep. Dec. 821 the Board referred to a "privilege" as "something which may be enjoyed but for which one has no enforceable claim against another." Simply put, a privilege is a benefit which is extended from one party to the other which can be unilaterally revoked by the party extending the benefit. In the *Hydro* case the employer attempted to alter its policy in respect of the use of commission vehicles during weekends by employees who were on-call. The use of vehicles was not covered in the collective agreement. In finding the employer's action to be in violation of the Section 70(1) freeze, the Board went on to comment that:

"the jurisprudence of this Board has tended to interpret this section as preserving the status quo in toto and not allowing the employer to unilaterally withdraw benefits or incidents flowing from the employment relationship even though they may properly be withdrawn outside the freeze period or during the course of the collective agreement."

Thus the term "privilege" has been held to include benefits or advantages which, by reason

of express or implied representation, custom or practice, a party reasonably believes will continue. The right of an employer to revoke a privilege outside the freeze period does not extend into the freeze period.

14. If the Board were to adopt the view that a party, which had waived its stated rights or had allowed an estoppel to arise in respect of these rights, could enforce strict compliance during the freeze period (as it could do outside the freeze period upon serving the other party with notice of its intent) it would severely restrict, if not negate, the meaning of the term "privilege" which appears in Section 70(1). If the Board were to adopt this view it would be restricting the meaning of "privilege" to those benefits which could not be subordinated to and revoked on the basis of some right expressly stated in the collective agreement. In the face of broadly framed management right clauses and scheduling prerogatives the Board is hard pressed to think of any privilege extended by management which could not be revoked if this view were adopted. In these circumstances, any number of benefits not established by formal agreement, including in many cases wash-up time, coffee breaks, early leaving or as in the *Hydro* case use of company vehicles, would be subject to withdrawal during the freeze period on the basis of a decision to insist on the exercise of express rights. The better view, having regard to the wording and purpose of the section, is that a right which has been waived in the face of a contrary practice or is fettered by an estoppel becomes a privilege extended to the other party, which, if not withdrawn prior to the commencement of the freeze, forms a part of the status quo which is maintained throughout the freeze.

15. It could be argued that because the union possessed a right to serve notice of its intent to strictly enforce its rights at any time, that this right was frozen by Section 70(1) and carries forward into the freeze period. While this view may be supported by a technical reading of the section, it is not consistent with the purpose of the section. The better view, which is also supported by the words of the section, is that the union, by virtue of conduct which would have estopped it from asserting its rights as of the expiry of the agreement, extended a privilege to the company. In terms of the reality of the relationship and the reasonable expectations of the parties as they existed at the commencement of the freeze period, the privilege which had been extended by the union superseded the rights of the union as set-out in article 4(a) for purposes of establishing the elements of the status quo which were frozen by section 70(1) of the Act as of May 1, 1978.

16. The union in this case is attempting to enforce rights which were unenforceable as of the expiry of the agreement and which had given way to a privilege extended by itself to the company. If the union wished to revoke this privilege or conversely to re-assert its rights, it was incumbent upon it to have communicated its intent to the company prior to the commencement of the freeze period. (See re *Carleton University* case, February 13, Board File No. 0284-77-U.) Having failed to do so the union is prohibited by section 70(1) from revoking the privilege which it had extended and which the employer reasonably expected to continue and which, if revoked, would jeopardize the period of stability which the section is designed to create.

17. Having regard to the foregoing the Board hereby finds that the attempt by the respondent as of May 2, 1978 to enforce strict compliance with a right it was estopped from enforcing as of the commencement of the freeze period constitutes an attempt to revoke a privilege extended to the company and hence is a violation of section 70(1) of the Act.

1925-77-M International Union of Elevator Constructors, Local 96,
(Applicant), v. **Beckett Elevator Company Limited**, (Respondent).

Arbitration – Section 112a – Whether certain sums received by employees must be included in earning for purposes of calculating vacation pay

BEFORE: Arthur L. Haladner, Vice-Chairman and Board Members W. Gibson and M. J. Fenwick.

APPEARANCES: *Denis J. Power, Joe Kennedy and Rosair Beaulieu for the applicant; Ross Dunsmore and Dermot Camack for the respondent.*

DECISION OF: Arthur L. Haladner, Vice-Chairman and Board Member W. Gibson. June 22, 1978

1. The name “Beckett Elevator Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Beckett Elevator Company Limited”.
2. This is a referral of a grievance to the Board under section 112a of The Labour Relations Act.
3. The applicant (Local 96) and the respondent, (Beckett) are the parties to a collective agreement (the Agreement) which is composed of the terms of the Canadian Standard Agreement in effect from November 12, 1973 to April 30, 1977, the Local Option Agreement dated April 30, 1975 and the Collective Agreement between Beckett and others and Local 96 and, as well, Locals 50 and 90.
4. The issue on referral is whether certain sums received by employees are to be included in earnings for purposes of computing entitlement to vacation pay.
5. Article VI, the vacation pay article, provides in material part as follows:
 - (a) On and after November 12, 1973, the Employer shall credit each employee with nine and one-half [9½] percent of *earnings for all hours worked* weekly and this amount shall represent the combined holiday and vacation pay credits. This amount shall be increased to ten [10] percent on September 2, 1974 and to eleven [11] percent on August 4, 1975 and to twelve [12] percent on July 5, 1976.

(emphasis added)
 - (b) The Employer shall remit to each employee, during the first seven [7] days of December, all monies held in trust on his behalf, for the first four [4] months of the current year. The Employer shall remit to each employee, during the last seven [7] days of June, all monies held in trust on his behalf, for the last eight [8] months of the year, to be paid the following year.
6. Prior to December of 1977, vacation pay entitlement was calculated and paid by Beckett on gross earnings; the relevant numerical percentage was applied to earnings for all hours for which employees were paid, whether at regular or premium rates. In December,

Beckett announced that beginning with the first cheque issued in 1978, vacation pay credit shown on employees cheques would be based on actual hours worked and that vacation pay was not payable on premium standby or travel time. At the time of the announcement, the employer had already ceased paying vacation pay on premium and travel time. On February 20, 1978, Beckett informed Local 96 that "[it] was in the process of calculating all monies paid to I.U.E.C. members in error since the signing of the present Agreement and upon completion of the calculations [it would] present [its] total claim for payment."

7. On March 3, 1978 Local 96 filed this Grievance on behalf of its members employed by Beckett since December 3, 1976. The Grievance alleges that Beckett has violated Article VI of the Agreement by ceasing to calculate and pay vacation pay on employees gross earnings as was done prior to December, 1977. More specifically, it alleges that the vacation pay percentage should be applied to the total of all earnings including overtime, premium pay, travel time, reporting time, injury, leave of absence, coffee breaks, layoff notice, welfare, pension, and education as defined in the Canadian Standard Agreement and to the total of all earnings including secondary jurisdiction – travel times, overtime travelling – pre-scheduled work – emergency service calls, and standby as defined in the Local Option Agreement.

The relevant provisions of the Agreement are as under:

Canadian Standard Agreement

Article VII

Par. 3. Work performed on Construction Work on Saturdays, Sundays, and before 8 A.M., and after 5 P.M., on Monday to Friday, inclusive, shall be classed as overtime, and paid for at double the rate of single time.

Article VIII

Par. 4. When men who are employed on contract service work perform any of the work listed above during hours other than between 8 A.M. and 5 P.M., Monday to Friday, inclusive, it shall be paid for at double the rate of single time.

Par. 6. It is agreed the regular working day shall consist of eight (8) hours between 8 A.M. and 5 P.M. five (5) days per week, Monday to Friday, inclusive. All other working time shall be classed as overtime and paid for at double the rate of single time.

Article IX

Par. 3. It is agreed the regular working day shall consist of eight (8) hours between 8 A.M. and 5 P.M., five (5) days per week; Monday to Friday, inclusive. It is agreed that in order for callbacks to be answered in downtown business areas or similar business areas, the Employer may assign a Mechanic or Mechanics to remain at a mutually agreed building beyond regularly established working hours not to extend beyond 6:30 P.M. For all such work beyond his regularly established working hours the Mechanic or Mechanics shall be paid at the rate of time and one-half. Should such assigned Mechanic or Mechanics be authorized to continue work on a job when a callback extends beyond 6:30 P.M., the man or men shall receive travel time and travel expense home.

Par. 4. Work performed on Sundays and Holidays shall be classed as overtime and paid at double the rate of single time. All other time worked before 8 A.M. or after 5 P.M. and all time on Saturdays shall be at the rate of time and one-half.

Par. 6. It is mutually agreed that for the benefit of the Employer, employee and the using public, a special obligation exists on the part of the men engaged in contract service to take care of callbacks outside of their regular work hours. It is understood that the obligation on the part of the service men to make overtime callbacks is not intended to impose a mandatory obligation but simply a mutual recognition of responsibility. A voluntary standby list shall be established by mutual accord of each Local Labor Committee, the Local Union Business Representative, the Employer's Representative and the maintenance employees concerned.

Travel time from home to job and from job to home on overtime callbacks (starting after regular working hours and terminating before start of regular working hours) shall be paid for at the same overtime rate applying to the work. Travel expenses on overtime callbacks shall be paid as agreed in Local Expense Agreements.

When consecutive overtime callbacks occur, the employee shall receive the applicable overtime rate and travel expenses from home to job, from that job to one or more other jobs, and then back home.

Men called out before the regular working hours shall receive the applicable travel time and travel expenses from home to job. [Exception: Employers may call and instruct men to report to any given job at 8 A.M. on his route in the primary.]

When callbacks made during regular working hours extend into overtime and the employee is authorized to continue work, he shall receive the applicable travel time and travel expense home.

Article X

Par. 13. LOCAL REPRESENTATIVE: The standard work week shall be five [5] days per week. Eight [8] hours per days Monday to Friday inclusive, being forty [40] hours per week. Earnings shall be guaranteed forty [40] hours per week between the hours of 8:00 A.M. and 5:00 P.M. Monday to Friday inclusive at local Mechanic-in-Charge rate less deductions applying. There will be premium pay under any overtime condition for physical work hours at prevailing mechanic's rate for repair or contract service. For offices having no clerical assistance, straight time overtime pay will be paid if the Local Representative does office work on overtime. Sick pay of forty [40] hours weekly will be paid for a maximum of 26 weeks, less monies received from Workmen's Compensation or C.E.I. Welfare Plan Weekly Indemnity. Vacation and paid Holidays shall be provided in accordance with Article VI of this Agreement. Welfare and Pension shall be provided in accordance with C.E.I. Welfare Pension Plans.

Article XII

TRAVELLING TIME AND EXPENSES

Par. 1. It is agreed that when Elevator Constructor Mechanics and Elevator Constructor Helpers are sent outside of the jurisdictional radius covered in this Agreement, travelling time will be paid at single time rate for the actual hours travelled during regular working hours. Additional travelling time up to five hours will be paid, at single time rates, for the actual hours travelled beyond regular working hours the first day only. If the trip requires more than one day, travelling time will be paid at single time rates for the actual hours travelled during regular working hours the second, third, or fourth day and any additional days necessary to complete a trip. Expenses incurred during trip to be paid for by the Employer.

Article XVI

WELFARE PLAN

Article XVII

PENSION PLAN

Article XVIII

EDUCATIONAL FUND

Article XIX

REPORTING TIME

Par. 1. Whenever a Mechanic or Helper covered by this Agreement reports to work on a construction, service or maintenance job on request of the Employer and there is no work available, except for reasons beyond the control of the Employer, the employee shall receive two (2) hours' pay at straight time rates.

Article XXIV

Par. 6. If an employee suffers an injury on the job requiring medical or special attention, he shall be paid his regular hourly wage rate for the difference between the hours actually worked and his scheduled hours or the regular work day on which the injury occurred. Further, an employee who provides the necessary aid to such injured employee shall be paid in a like manner for the time required to provide such aid.

Par. 9. An employee shall be entitled to a short-term leave of absence, without pay, under the following conditions and the Employer may request proof in support thereof:

[a] Serious accident involving a member of his immediate family [parent, spouse, child].

[b] Required to testify before a court of law, labour court, Unemployment Insurance Commission court of a grievance Arbitrator. [In the event the employee makes any such appearance on the behalf of the Employer, he shall suffer no loss in wages for the regular work day, or part thereof, spent on the Employer's behalf.]

[c] Personal illness or accident.

[d] At the request of the Union, an Employee designated by the Union to participate in legitimate Union business.

[e] When death occurs in an employee's immediate family, i.e., parent, parent of current spouse, child, brother or sister, the employee, on request, will be excused for up to a maximum of three [3] normally scheduled working days immediately following the death. An employee excused from work under this paragraph shall receive eight [8] hours pay at his straight time hourly wage rate only for the day of the funeral [Monday through Friday], and providing he attends, the funeral.

Par. 10. The regular work day shall include two [2] coffee breaks of up to a maximum of fifteen [15] minutes each. One such break shall be taken in approximately the middle of the forenoon and the other shall be taken in approximately the middle of the afternoon. In addition, another such break shall be taken in approximately the middle of an overtime period of four [4] consecutive hours.

Par. 14. [a] An employee, subject to lay-off of more than two [2] working days, shall be given an advance notice of lay-off of forty-eight [48] hours unless the reason for such lay-off is due to circumstances beyond the control of the Employer, i.e., Acts of God, explosions, strikes, power failure or such similar reasons. An employee who fails to work once he has received such notice shall only be paid for the work done. Saturdays, Sundays, named holidays, or vacations shall not be counted in the terms of such notice.

[b] Where notice is required and such notice is not given, the employee will continue to be employed by the Employer until such notice is given.

[c] When an employee is laid off, the Employer shall provide him with such papers as are required by the Federal Unemployment Insurance Act. The wages due him, or such other paraphernalia, shall be supplied the Employee by the next pay period.

Local Option Agreement

SECONDARY JURISDICTION

The secondary jurisdiction of Local 96 of the City of Ottawa shall be within a radius of sixty-five (65) miles from the Chateau Laurier, and shall include in addition the City of Pembroke. Travel times and zones within the secondary jurisdiction shall be as follows:

From the primary to 8 miles, 15 minutes travel time each way; from 8 to 11 miles, 30 minutes travel time each way; from 11 to 15 miles, 45 minutes travel time each way; from 15 to 25 miles, 60 minutes travel time each way

Travel times to the following cities or towns shall be as follows:

Arnprior	– 1½ hrs. travel time each way
Brockville	– 2½ hrs. travel time each way
Cornwall	– 2½ hrs. travel time each way
Pembroke	– 3 hrs. travel time each way
Perth	– 1½ hrs. travel time each way
Smith Falls	– 1½ hrs. travel time each way
Kingston	– 3 hrs. travel time each way

Prescott – 2 hrs. travel time each way

These cities or towns are not to be construed as name towns.

OVERTIME TRAVELLING

SERVICE AND CONSTRUCTION HOURLY PAID PERSONNEL

1. PRE-SCHEDULED WORK

Under Article XII Canadian Standard Agreement, overtime travelling is defined as follows:

“Additional travelling time up to 5 hours will be paid at single time rates for the actual hours travelled beyond regular working hours, the first day only.”

This ruling applies generally only to planned work on out of town assignments where the Mechanic and Helper has prior notice of a trip.

2. EMERGENCY SERVICE CALLS

Where an emergency call is received and the Mechanic has to leave town on short notice, the employer is obligated to pay double instead of single time under some circumstances. Generally, the following would apply for EMERGENCY CALL SERVICE, keeping in mind that DOUBLE TIME MUST BE PAID FOR ALL DAYTIME TRAVELLING ON SUNDAYS AND STATUTORY HOLIDAYS UNDER ANY CONDITION.

- a) On Sunday or statutory holidays, double time is paid during any part of the 8 hours daytime travelling. If the trip continues with overnight berth, an additional maximum of 5 hours is paid at single time rates.
- b) For any overtime where a Mechanic and Helper is required to make a continuous trip to the job and return, without overnight berth or hotel, all travelling time must be paid at the double rate.
- c) For a trip involving travelling time at the double rate to the destination followed by hotel stopover, single time rates would be paid returning on a Saturday between 8 a.m. and 5 p.m., with an additional 5 hours maximum at single time if travelling after 5 p.m.
- d) Travelling to destination with an overnight berth, paid at single time rates with maximum of 5 pay hours travelling time. Travelling time the following day after regular working hours, paid at single rate with maximum of 5 hours.
- e) For other than Sundays or statutory holidays, any double rates for

travelling which would normally apply under the above conditions would be time and one-half instead of double time, if the customer has any form of contract service.

STANDBY

1. The method of designating men for callback duty will be arranged as provided in Article 9, Paragraph 6 of the Canadian Standard Agreement, but it is understood that sufficient personnel, by means of a schedule, will be provided at all times.
2. The periods of standby will be allotted by mutual consent of the maintenance mechanics involved, and will cover all time not normally worked.
3. A list with the names and the times that each mechanic is on standby shall be furnished to the Union every six months, or whenever by mutual accord the list or Agreement is changed.
4. The Company agrees to reimburse each employee when he is on standby at the rate of 112½% of the mechanic's rate for all hours worked whether straight time, or the overtime rate, for that period of time that he is on standby.
5. Only one mechanic will be on standby at any one time, unless the Company is willing to pay more than one man standby pay.
6. When a mechanic is on standby he may use a paging device supplied by the employer, with no restrictions as to time or place.
7. This clause will not apply to Local Representatives.

8. At the hearing, the parties were agreed that Article VI(a) was clear and unambiguous and that the Board need not resort to extrinsic evidence to construe it. Not surprisingly, however, Local 96 and Beckett offered conflicting interpretations of what Article VI(a) clearly and unambiguously meant. Counsel for Local 196 contended that the phrase "all hours worked" as it appears in Article VI(a) was not limited to the hours the employee actually worked at his job, in the sense of performing the particular tasks appropriate to his classification, but included all hours for which the employee was entitled under the Agreement to be paid. Counsel conceded, however, that payments made in respect of welfare, pension and education were not covered.

9. Counsel for the employer, for his part, conceded that vacation pay entitlement should properly be calculated on overtime and premium pay. He maintained, however, that the vacation pay percentage, which is presently 12%, should not be applied to travel time, reporting time, injury, leave of absence, coffee breaks, layoff notice, secondary jurisdiction – travel times, overtime travelling – pre-scheduled work, emergency service calls, and standby. Counsel argued that the parties, by inserting the qualifying phrase "all hours worked" after the word "earnings" have evidenced a clear intention to limit the payment under the Agreement of vacation pay, which he pointed out is payable at a rate well in excess of the minimum prescribed by law. Although the parties have negotiated a method of payment to cover the above noted situations, they have chosen, counsel says, to deal with the issue of

compensation outside the work concept. In support of this argument, counsel pointed out that in none of the situations in question are employees doing things which the Agreement describes as work. Counsel also referred the Board to a number of other provisions of the Agreement which define respectively, work jurisdiction, construction, repair, and contract service work. He contended that these provisions, because they specifically address themselves to the question of what constitutes work for purposes of the Agreement lend support to the argument that employees receiving compensation for such things as travelling and standby time should not be considered to be "working hours" within the meaning of Article VI(a). It is unnecessary to reproduce all of the other provisions referred to by counsel. Suffice it to say that the Board has carefully reviewed these provisions and does not find them of assistance in determining the question before us.

10. The question of what constitutes "hours (or time) worked" or "work" for purposes of determining entitlement to benefits under a collective agreement has been dealt with by a number of adjudicators and arbitration boards (see, for example,

Re United Steelworkers' Local 7105, and Automatic Screw Machine Products, Ltd. 23 L.A.C. 397 (Johnston); *Re International Nickel Co. of Canada Ltd. and United Steelworkers*, 8 L.A.C. (2d.) 433 (O'Shea); *Ernest Wiberg and The Treasury Board (Ministry of Transport)* September 23, 1970 (Weatherill). These decisions establish that the test for determining whether an employee can be considered to be "working" or "at work" when he is not actually working at his job is whether the employee is providing a service to the employer during the period in question or is for that period under the employer's direction and control (for example, under a duty to ensure that production continues in a safe and proper manner – the situation in *Automatic Screw* where the Board concluded that the phrase "hours worked" included the periods that the grievors took their lunch break since their responsibilities continued during that period or waiting for work after being instructed by the employer to wait – the situation in *International Nickel*). Although these decisions arise in a different contractual context – that of entitlement under a collective agreement to overtime – the Board is of the view that the test they establish is equally applicable to the context at hand. When that test is applied, the conclusion which emerges is that the phrase "hours worked" in Article VI(a) includes some of the situations described by the provisions in question but not all.

11. Travelling time both during and outside working hours would be included on the ground that employees, when travelling in the situations described in Article IX par. 6 and Article XII par. 1 [when they are travelling from home to job and from job to home on overtime callbacks (starting after regular working hours and terminating before start of regular working hours) and when they are sent outside the jurisdictional radius covered in the Agreement] and in the situations described in the Local Option Agreement are not just travelling to and from work in the usual sense, but are travelling on the employer's business, at the employer's expense, and at some considerable inconvenience to themselves. That was essentially the conclusion reached by the Adjudicator in *Ernest Wiberg*. In that case, the grievor, a steamship inspector, was requested by his employer to perform certain steamship trials for which he was required to be in Collingwood at 7:30 a.m.. In order to arrive at the prescribed hour, the grievor was required to leave his home in Toronto at 5:30 a.m., three hours before his usual starting time. In finding that the grievor was "at work" while en route from Toronto to Collingwood, Mr. Weatherill stated:

“Generally speaking, when an employee travels to his work each day, he is not “at work” until he actually arrives at his office or plant or job site. If his residence is at some distant location, that is his own affair. Once he does arrive at the office, however, he is said to be at work even though he may not actually be performing the particular tasks appropriate to his classification. He may simply be sitting at his desk waiting for an assignment, and yet he is indeed “at work”, and entitled to be paid. Likewise where, in the course of the day, he travels from one location to another for the purpose of performing his job, he is “at work” throughout that time. In the instant case, the essence of the employer’s case is that the grievor did not begin work on December 2 until he arrived in Collingwood at 7:30 a.m. that morning. The underlying assumption is that his getting to work at Collingwood that day was the grievor’s own business, just as his getting to work in Toronto on any other day was his own business. Luckily for the grievor, he was not asked to report in Vancouver or Halifax that day!”

The Board agrees with the decision in *Wiberg* and is of the view that it cannot be distinguished on either of the grounds suggested by counsel for the employer: that the collective agreement in *Wiberg* did not contain a definition of overtime or any other kind of work; that it did not contain a specific provision for travel in the circumstances there at issue. As stated, the Board is of the view that the definitions of work in the other articles of the Agreement referred to by counsel for Beckett do not advance the issue. In the Board’s view, the conclusion to be drawn from the fact that the Agreement distinguishes between travelling time hours and regular working hours is simply that the parties have agreed upon a formula for compensating employees for travelling in the circumstances there defined, and not that the intention of the parties was to distinguish hours spent travelling from hours spent working for purposes of entitlement to vacation pay.

12. The same reasoning does not, however, apply with respect to reporting time, injury and leave of absence (i.e. when an employee attends the funeral of an immediate family member and is paid his regular wage for the day). In the case of reporting time, employees are not paid for services rendered but rather for there being no work available. By the same token, an employee who suffers an injury on the job and is unable to work out his shift is paid his regular hourly wage for the rest of the day but not because he is performing any duties for the employer. So too in the case of an employee who is excused from work so that he may attend a relative’s funeral.

13. The issues of whether coffee breaks and standby attract vacation entitlement can be decided without reference to the test enunciated above. By providing in par. 10 of Article XXIV that “the regular work day shall include two coffee breaks” the parties have made it clear that employees on coffee breaks are to be regarded as “working” for purposes of the Agreement irrespective of whether they could otherwise be found to be providing a service to the employer. The Board takes a similar view of the use by the parties of the term “work” to describe the situation where employees are required to remain at a mutually agreed upon building beyond regularly established working hours so that they will be available to answer callbacks in business areas (Article IX par. 3). By making it clear that such waiting time constitutes work, the parties have made unnecessary the application of the test enunciated above.

14. As regards standby, the only hours for which the standby rate is paid are the hours the employee is actually working. Under the standby provision of the collective agreement, employees who are called back during the period of time that they are on standby are paid at the rate of 112½% for all hours worked, whether straight time or overtime. It follows that the relevant vacation percentage applies to standby pay (To the extent that employees on standby do not actually work, they receive no standby and thus no vacation pay).

15. The same holds true for payments received by employees during periods of layoff notice where such notice is required under par. 14 of Article XXIV – provided, of course, that the employee works out the required notice period.

16. For the reasons stated, the Board finds that the vacation pay percentage specified in Article VI(a) of the Agreement applies to earnings in respect of overtime, premium pay, travel time, coffee breaks, standby and layoff notice as defined in the Canadian Standard Agreement and to earnings in respect of secondary jurisdiction – travel times, overtime travelling – pre-scheduled work – emergency service calls and standby as defined in the Local Option Agreement and that it does not apply to earnings in respect of reporting time, injury, leave of absence, welfare, pension and education as defined in the Canadian Standard Agreement.

17. The Board will remain seized of the grievance to deal with the question of relief should that prove necessary.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.

2. The respondent company, over a period of several collective agreement terms, had made vacation entitlement payments based on an employee's gross earnings, as, have other employers in the industry. It now claims it had miscalculated the payments and seeks to correct the alleged error.

3. I find that other than payments it makes directly to the union's education, welfare and pension plans on behalf of employees it must calculate vacation payments on gross earnings of the employee.

4. It may be of interest to note that the Employment Standards Act, 1974 embraces the principle that vacation payments are to be calculated on total wages received by an employee.

0160-78-JD Bricklayers, Masons Independent Union of Canada, Local 1,
(Complainant), v. Toronto Building and Construction Trades Council,
(Respondent).

Jurisdictional Dispute – Respondent discussing no subcontracting arrangement with em-

ployer organization – Complainant alleging that arrangement, if concluded, would restrict future access to work and require assignment of work to other trade union – No present or existing dispute concerning work assignment – application held premature

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

APPEARANCES: *N. Endicott and B. Iler for the applicant; A. Minsky, C. Ballentine and A. Pivnick for the respondent.*

DECISION OF THE BOARD; June 6, 1978

1. This is a complaint brought under section 81 of the *Labour Relations Act* requesting the Board to issue a direction with respect to an alleged assignment of work.

2. The complaint described the work in dispute as “all work customarily performed by members of the complainant for companies with whom the complainant has a collective bargaining relationship, who are members of the Masonry Contractors Association of Toronto, Inc., to whom such work has been subcontracted by the members of The Metropolitan Toronto Apartment Builders Association”. The specific allegation was that such work has been assigned to “[m]embers of The Toronto Building and Construction Trades Council”.

3. The complainant acknowledged that the factual basis upon which its complaint rested was an apprehended agreement between The Metropolitan Toronto Apartment Builders Association (MTABA) and the Toronto Building and Construction Trades Council (the Council) that would provide that the MTABA would not subcontract bricklaying work to sub-contractors who did not have a collective bargaining relationship with the Council or its constituent members. The effect of this “sub-contracting” provision would be to prevent bricklaying work from being sub-contracted to non-union contractors or contractors dealing with other unions such as the complainant. The complainant requested that the Board prohibit the Council from making any agreements that would alter the present situation permitting the sub-contracting of work to those contractors (members of the Masonry Contractors Association of Toronto, Inc.) which dealt with the complainant.

4. The question before the Board is whether the facts can be characterized as a situation falling within section 81(1) of the Act. That section reads:

81. – (1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

5. The respondent council argued that the Board did not have jurisdiction to deal with this type of problem where there was no requirement that "particular" work be assigned to a particular trade union. At the very least, according to counsel for the council, the complaint under section 81 was premature since the sub-contracting provision has yet to be executed, let alone enforced.

6. The complainant argued that the Board's jurisdiction under section 81 was sufficiently wide to deal with the present problem as what was involved was a conflict between two unions over the allocation of bricklaying work in general. In support of its argument, the complainant relied on the Board's decision in *Donaldson-Barron Limited*, [1976] OLRB Rep. Dec. 793. In that case a council of trade unions had filed grievances against two general contractors in respect of work contracted to certain sub-contractors which employed persons who were not members of a union affiliated with the council. The general contractors in turn made it clear to the sub-contractors that the work should be done by members of the union affiliated with the council. The Board held the council through the medium of the general contractors required the sub-contractors to assign particular work to persons in a particular trade union so that the matter fell within the Board's jurisdiction under section 81.

7. Does the *Donaldson-Barron* decision support an exercise of the Board's jurisdiction under section 81 in this case? We think not. As the complainant readily admitted, its application was based solely upon the anticipated operation of a sub-contracting clause. In this case there does not exist a dispute over the assignment of particular work to persons in a particular trade union. What is being contested here is the general validity of the sub-contracting provision, and not a particular work assignment flowing from such a sub-contracting provision. The Board does not have a jurisdiction to proceed under section 81 in these circumstances.

8. The complaint is dismissed.

0297-78-R Local 1590, International Brotherhood of Electrical Workers, (Applicant), v. **Cable Tech Wire Company Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Charges – Practice and Procedure – Board refusing to hear late allegations of improper or irregular conduct

BEFORE: M. G. Picher, Vice-Chairman and Board Members E. C. Went and W. F. Ruth-erford.

APPEARANCES: S. B. D. Wahl, M. Fisher and B. Alfred for the applicant; W. J. McNaughton and S. Riemer for the respondent; Michael G. Horan for the objectors.

DECISION OF THE BOARD: June 21, 1978

1. The name "Cable Tech Wire Company Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Cable Tech Wire Company Limited".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Town of Whitchurch Stouffville save and except foremen, those above the rank of foreman, office, technical and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. A statement of desire was filed by a group of employees opposing the instant application. In view of the fact that it did not bear a sufficient number of signatures of employees on whose behalf membership evidence was filed so as to call into question the outright certifiability of the applicant, the Board did not require to hear evidence as to its origination and circulation.

6. A number of allegations in the nature of charges relating to the membership evidence were filed by the respondent.

7. In a letter dated Friday, June 9, 1978, the last business day before the hearing, counsel for the respondent alleged that an employee threatened two employees that they "had better join the union" and another employee organizer told an employee that the union was "in" at the plant, which caused him to believe that he must join the union or lose his job.

8. Section 47 of the Board's Rules of Procedure provides requirements for sufficiency of notice of allegations of improper or irregular conduct and subsection (2) of the section provides:

47.-(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

9. In view of the fact, admitted by counsel for the respondent, that the respondent had knowledge of these allegations as early as May 26, 1978 and did nothing to advise either the Board or the applicant of the alleged misconduct until the last business day before the hearing, the Board did not allow the respondent to adduce evidence in respect of those allegations. The reason put forth by counsel for the respondent to explain the delay, namely that it did not know until the Friday prior to the Monday hearing that witnesses would be available to testify to the allegations, is not sufficient reason to have withheld them virtually until the eve of the hearing. The delaying of serious allegations operates to the obvious prej-

udice of an applicant for certification. It can have little or no opportunity to investigate and prepare to meet the allegations made against it. The union is moreover prejudiced in that it might be required to seek an adjournment of its application to meet the case made against it, in the event that evidence is heard, thereby occasioning delay in the certification process that can itself cause serious harm to the applicant's position, regardless of the merits of the charges made.

10. For these reasons the Board has in the past declined to hear evidence of allegations filed in certification proceedings virtually at the hearing room door where it appears that there was no sufficient reason for the withholding of the allegations (see *Fleck Manufacturing Limited* 62 CLLC ¶16,236), and for these reasons it did so in this case.

11. The Board further ruled that with respect to allegations of improper or irregular conduct in the gathering of membership evidence contained in an earlier letter from counsel for the respondent dated May 26, 1978, there was sufficient particularity of the charges and adequate notice to the applicant. It therefore allowed the respondent to adduce evidence in respect of those charges.

12. The allegations in that instance were that on or about May 15, 1978 Mr. Randy Fowler, an employee involved in soliciting membership evidence on behalf of the applicant, informed an employee that if he did not sign a membership application he would lose his job. That allegation was not, however, sustained in the evidence given before the Board.

13. The employee in question, Mr. John A. Trick, testified that he spoke with Mr. Fowler about the union, but denied that any threat was made to his job. He acknowledged that he later asked a foreman, Mr. Robert Clark, whether he would lose his job if he did not sign a card supporting the union. His evidence was that that inquiry was prompted by rumours he had heard generally and by conversations with both another employee named "Nick" and with Mr. Trick's wife.

14. Mr. Ziegfried Riemer, President of the respondent, testified that in a private conversation in his office Mr. Trick effectively admitted that he joined the union only because he had been threatened by Mr. Fowler. That hearsay evidence of the President of the employer company was directly contradicted in the testimony of Mr. Trick before the Board.

15. The issue becomes which inference is to be drawn having regard to the evidence adduced and to the demeanour of the witnesses. There is no doubt that Mr. Trick was ill at ease and unforthcoming in his testimony before the Board. But the Board is not satisfied that the fear exhibited by Mr. Trick was more likely to have been the result of anything said by Mr. Fowler than by his continual questioning about the union by management over three separate interviews. This is particularly so where he was asked by members of management whether he had joined the union and why he had done so.

16. Mr. Trick's evidence before the Board was that he was not threatened by Mr. Fowler. Given the doubt surrounding the circumstances of his apparent contrary disclosure to his employer the Board does not find sufficient evidence to cast doubt upon the quality of the membership evidence filed.

17. The Board is satisfied on the basis of all the evidence before it that more than

fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.
-

T-97-77 International Chemical Workers' Union, v. Canadian Chemical Workers' Union, Local 28,

Trusteeship – Application for continuation of trusteeship made following the expiration of one year – Whether Board can permit extension of trusteeship term – Board granted consent to extension

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and W. Gibson.

APPEARANCES: *Alick Ryder appearing for the International Chemical Workers Union; Daniel Ublansky appearing for Canadian Chemical Workers' Union, Local 28.*

DECISION OF THE BOARD: June 28, 1978

1. On March 28, 1978, the International Chemical Workers' Union (the "International") applied, pursuant to section 73(2) of The Labour Relations Act, for the consent of the Board to continue the supervision or control of its Local 536 for an additional period of twelve months from March 5, 1978, or for such further and other period as the Board deems just and appropriate.

2. On March 4, 1977, the International assumed supervision or control over the International Chemical Workers' Union, Local 536 ("Local 536"), whereby the autonomy of Local 536 was suspended. The International filed a statement with the Board in the prescribed form on October 14, 1977. Section 73(1) provides that such statement shall be filed within sixty days after the supervision or control has been assumed.

3. The Canadian Chemical Workers' Union, Local 28 ("Local 28") has opposed the request for an extension on the grounds that the Board lacked the jurisdiction to entertain this request. Initially, the International challenged the status of Local 28 to appear at the hearing before the Board. While the International did not concede the status of Local 28 to appear at the hearing in its own name, it did agree to accept Local 28 at the hearing as the representative of the members and former members of Local 536. Local 28 argued that the word "continue" in section 73(2) suggested that in order for the Board to have jurisdiction the supervision or control ought not to have lapsed. It was pointed out that the supervision or control would be in effect for twelve months on March 4, 1978. It was argued that on March 28, 1978, there was nothing to continue because the supervision or control had already lapsed.

4. Local 536 was formerly the bargaining agent for between five hundred and fifty and six hundred employees of Dupont of Canada Limited at its Maitland Works. On April 18, 1977, the Canadian Chemical Workers Union displaced Local 536 as the bargaining agent for these employees. Local 28 is presently the bargaining agent for these employees. Certain events happened prior to this displacement which led to the imposition of the supervision or control on March 4, 1977, by the International.

5. While Local 536 is still in existence, it clearly does not have the number of members it had when it was the bargaining agent prior to April 18, 1977. However, the title to certain monies in a bank account and a credit union and the title to certain dues which have previously been deducted by Dupont of Canada Limited are currently pending in other proceedings before the courts and a board of arbitration. It was argued by the International that the Board should do nothing to disturb the *status quo*.

6. Section 73 provides for the reporting of supervision or control over subordinate trade unions to the Board and the Minister of Labour and permits a general surveillance of what is commonly known as trusteeships or administrations. The Board is not called upon under this section to determine the sufficiency of the reasons for the imposition of supervision or control. The essential feature of section 73(1) is the provision for the supply of information.

7. There are many reasons for the imposition of supervision or control over a subordinate trade union. In the instant situation the formation of and the support which was enjoyed by the Canadian Chemical Workers' Union was clearly a factor in the imposition of the supervision or control. However, there is nothing before the Board which indicates that anyone is prejudiced by the imposition of the supervision or control. The employees, on whose behalf Local 28 appears, are represented in collective bargaining and any right or entitlement they may have to the monies which are the subject of litigation and arbitration remains unaffected by the imposition of or continuation of supervision or control. These employees are not precluded from endeavouring to assert any claims they may have to the monies in question.

8. The Labour Relations Act regulates certain aspects of labour relations. The complex subject of trusteeships or administrations is briefly dealt with in one section of that Act. In our view, the provisions of section 73 are not to be interpreted in a narrow fashion but are to be broadly interpreted so that the Board may respond to the realities of any given situation where supervision or control have been imposed on a subordinate trade union.

9. The International argued that it was necessary to continue the supervision or control of Local 536 in order to assure that it had the requisite status to maintain its proceedings before the courts and a board of arbitration. The Board expresses no view on the necessity to continue the supervision or control of Local 536 as a prerequisite to maintaining the said proceedings. It appears to the Board, however, that the members and former members of Local 536 will not suffer any prejudice in the circumstances of this application if the Board continues the supervision or control of Local 536, whereas the International may suffer prejudice if the Board does not continue the supervision or control of Local 536. The balance of convenience favours the consent of the Board to the continuance of the supervision or control.

10. The Board does not agree that it lacks jurisdiction to entertain this application and finds that it has the power under section 73(2) to continue the supervision or control retroactively from March 3, 1978. In this regard see the decision of the Board in the *Operative Plasterers' and Cement Masons' International Association of The United States and Canada and its Local 598* case (Board File 1334-77-U and T-87-76, unreported decision dated March 2, 1978).

11. Having regard to the foregoing the Board, pursuant to the exercise of its discretion under section 73(2) consents to the continuance of the supervision or control by the International Chemical Workers' Union over the International Chemical Workers' Union, Local 536, for a further period of one year from March 3, 1978.

0138-78-R Canadian Appliance Manufacturing Co. Limited, (Applicant), v. United Steelworkers of America, (Respondent # 1), v. United Electrical, Radio and Machine Workers of America (UE), (Respondent # 2), v. **Canadian General Electric Company Limited**, (Intervener # 1), v. Westinghouse Canada Limited, (Intervener # 2).

Sale of a Business – Following merger employer entering into collective agreements with union – agreements containing conflicting recognition provisions respecting intermingled employees – problems not amenable to resolution under section 55 since they arose from the agreements not the merger – application dismissed

BEFORE: Donald D. Carter, Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *John P. Sanderson, Q.C. and F. W. Hannah for the applicant; Paul Cavalluzzo, Elizabeth Lennon and John Fitzpatrick for respondent #1; Val Bjarnason and Art Jenkyn for respondent #2; Edward T. McDermott for intervener #1; Corinne Murray and D. J. Goulet for intervener #2.*

DECISION OF THE BOARD: June 2, 1978

1. The name “United Steelworkers of America, Local 7921, United Steelworkers of America, Local 3129, United Steelworkers of America, Local 5264” appearing in the style of cause of this application as the name of respondent #1 is amended to read: “United Steelworkers of America”.

2. The name “United Electrical, Radio and Machine Workers of America, (UE) Local 514” appearing in the style of cause of this application as the name of respondent #2 is amended to read: “United Electrical, Radio and Machine Workers of America, (UE)”.

3. This is an application under section 55 of *The Labour Relations Act* seeking clarification as to the scope of the bargaining rights held by the United Steelworkers of America

on behalf of two of its locals, Office Local 7921 and Local 3129. The applicant has requested that the Board exercise its jurisdiction under section 55 by making certain determinations that would delimit the bargaining rights now being claimed by the Steelworkers on behalf of these two locals.

4. The applicant company came into existence in January, 1977 as the result of a merger of GSW Appliances Ltd. and the Appliance Division of Canadian General Electric Ltd. A further merger occurred in July, 1977, when the applicant purchased the Appliance Division of Canadian Westinghouse Ltd.

5. When the first stage of the merger took place in January, GSW Appliances Ltd. (G.S.W.) was a party to collective agreements with each of the two Steelworker locals. The agreement with Local 3129 contained a clause recognizing that Local as "the sole collective bargaining agency for all of the employees in Metropolitan Toronto, save and except guards, office and clerical workers, foremen and those above the rank of foreman". This bargaining unit, which will be described as "the plant and maintenance unit", included employees at G.S.W.'s two Toronto locations – Gibson and Wright Avenues and 35 Suntract Road. The agreement with Office Local 7921 contained a clause recognizing that Local as "the sole collective bargaining agency for all office, clerical, and technical employees in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisors and salesmen [and certain other named positions]". This bargaining unit, which will be described as "the office and clerical unit", also covered employees at both of G.S.W.'s Toronto locations.

6. Another local of the Steelworkers, Local 5264, at the same time held bargaining rights at Canadian General Electric's Consumer Products Service facility, located at 2 Monogram Place, Weston, for consumer products service technicians assigned to work in and out of Metropolitan Toronto. This bargaining unit did not include either the warehouse employees or the office and clerical employees, who were unorganized at that location. The applicant company has since signed a collective agreement recognizing that the Steelworkers, Local 5264, holds bargaining rights for this bargaining unit. At the time of the hearing, however, there were approximately 20 warehouse employees and 30 office and clerical employees not included in this bargaining unit.

7. The second stage of the merger, occurring in July 1977, resulted in the acquisition of the two Toronto facilities of the Appliance Division of Canadian Westinghouse Ltd. – one at 110 Norfinch Drive, Downsview and the other at 840 York Mills Road, Don Mills. The respondent, United Electrical, Radio and Machine Workers of America (UE) and its Local 154, held certain bargaining rights at both locations. These bargaining rights were recognized by the applicant in two agreements that it signed with the UE on July 27, 1977. One agreement identified as the company "Canadian Appliance Manufacturing Company Limited located at 110 Norfinch Drive, Downsview, Ontario" and contained a clause recognizing "the Union as the sole and exclusive bargaining agent for all employees of the Company, save and except assistant foremen, persons above the rank of assistant foreman, supervisor of building maintenance, counter sales clerks, salesmen, office staff, and persons engaged on a formalized training programme, with respect to rates of pay, hours of work, and other conditions of work". Approximately 25 employees were included in this bargaining unit and less than 10 persons were excluded from the unit as office and clerical employees. The other agreement identified as the company "Canadian Appliance Manufacturing

Company Limited located at 840 York Mills Road, Don Mills, Ontario” and contained a clause recognizing “the Union as the sole and exclusive collective bargaining agent for all employees of the Company, save and except assistant foremen, persons above the rank of assistant foreman, supervisor of building maintenance, counter sales clerks, salesmen, office staff, and persons engaged on a formalized training programme, with respect to rates of pay, hours of work, and other conditions of work”. Approximately 26 employees were included in this bargaining unit, and less than 10 persons were excluded from this unit as office and clerical employees.

8. In January of 1978 discussions took place between the officials of the applicant and representatives of Steelworkers concerning the removal of certain work to 2 Monogram Place. In a letter dated January 24, 1978, the applicant indicated to the Steelworkers that, in its opinion, the move did not constitute a breach of the collective agreement.

9. On February 16, 1978, the applicant signed two collective agreements – one with Local 3129 of the Steelworkers and the other with Office Local 7921 of the Steelworkers. Both collective agreements were for a term running from June 24, 1977 to June 23, 1978 and both identified the applicant company as the Canadian Appliance Manufacturing Co. Ltd., Weston, Ontario. The recognition clauses in these two collective agreements were the same as those in the agreements between these two Locals and G.S.W.

10. Following the signing of the collective agreements, the union indicated to the applicant that it was claiming bargaining rights in respect of employees at all of the applicant’s locations in Metropolitan Toronto. On February 24, 1978, two grievances were filed, one by Local 3129 and the other by Office Local 7921, contending that the applicant was in breach of the collective agreement by failing to deduct union dues for certain employees at Monogram Place, York Mills Road, and Norfinch Avenue. The Steelworkers later clarified this position, informing the applicant that no claim was being made in respect of employees covered by the collective agreements with the UE.

11. On April 14, 1978, two office and clerical employees, Jim Lucas and Eva Fordor, were transferred from the Gibson and Wright Avenues location to 2 Monogram Place. These two transfers are the extent of the intermingling of employees that has occurred since the merger.

12. It is undisputed that the merger of the three operations into one constituted a sale of a business under section 55 of *The Labour Relations Act*. The issue before the Board is whether it should exercise its jurisdiction under section 55 to resolve the dispute that has arisen over the scope of the bargaining rights held by Local 3129 and Office Local 7921 of the Steelworkers. Both the applicant company and the respondent UE argued that the matter should be resolved by the Board rather than through grievance arbitration. Their arguments framed the problem as being representational in nature, requiring the Board to make a determination as to whether any trade union was entitled to represent the 70 unorganized employees at three of the company’s locations in Toronto. The Steelworkers, on the other hand, argued that the problem before the Board did not flow from the sale that had occurred and was simply the product of the collective agreements that the applicant had entered into following the sale. In other words, once a successor employer had made a collective agreement with the trade union that had dealt with its predecessor, it was too late for the Board to determine under section 55 the extent of the bargaining rights inherited from the

sale, leaving any dispute as to the scope of the bargaining unit to be resolved through grievance arbitration.

13. A primary purpose of section 55 is to preserve existing bargaining rights where a sale of a business has taken place. The new owner becomes a successor employer and, by operation of subsections 2 and 3, inherits certain collective bargaining obligations incurred by the former owner. Subsections 2 and 3 read as follows:

55.-(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

14. Where a collective bargaining relationship already exists between a union and the successor employer, or where the successor employer already employs persons not represented by any trade union, problems may be created by this legacy of collective bargaining obligations. Such problems appear to be recognized by subsections 4 and 6 of section 55, which provide the Board with a jurisdiction to define the scope of bargaining rights following the sale of a business. These sections read:

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection 3; or
- (b) any person, trade union or council of trade unions claims that, by

virtue of the operation of subsection 2 or 3, a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection 3 with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

Under subsection 8 of section 55, moreover, the Board has been given a wide power to establish such procedures as are necessary to the disposition of an application made under this section. Subsection 8 reads:

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

15. Do these provisions give to the Board a jurisdiction to deal with the problem in

the instant case? If we have any jurisdiction under subsection 4 in this case, it must flow from paragraph (b). But if a conflict of bargaining rights exists, it has not resulted from the operation of either subsection 2 or 3, as required by the language of paragraph (b). Rather, if there is such a conflict, it flows from the recognition clauses in the collective agreements entered into by the applicant company following the sale of the business. As a result, the conditions necessary for an exercise of our jurisdiction under paragraphs (c) and (d) of subsection 4 are not present in this case.

16. The applicability of subsection 6 of section 55 is more problematic. There has been some slight intermingling of employees at the Monogram Place location, but none at either Norfinch Drive or York Mills Road. The intermingling, moreover, occurred well after the sale of the business had taken place and after the applicant company had entered into collective agreements replacing the collective agreements inherited from G.S.W., C.G.E. and Canadian Westinghouse. Even if the Board were able to draw a conclusion that there was a sufficient degree of intermingling for it to exercise its discretion under subsection 6, it is quite clear that a declaration under paragraph (a) would be inappropriate since the agreements contemplated by subsection 2 have now been replaced by the agreements entered into by the applicant. Given the inapplicability of paragraph (a), the Board has serious doubts as to whether any of the other provisions of subsection 6 are applicable to this situation.

17. The problem in this case is in essence one relating to the scope of the bargaining units set out in two collective agreements that were reached after the sale of the business – one between the applicant and the Steelworkers on behalf of Local 3129, and the other between the applicant and the Steelworkers on behalf of Office Local 7921. In these circumstances it must be assumed that the applicant company had in mind the bargaining unit problems created by the sale when it negotiated these agreements. If these agreements have in turn given rise to problems, such problems must now be regarded as flowing from the collective agreements rather than from the sale that preceded these agreements. The applicant's present problem is not unlike that of an employer bound by a collective agreement who buys a business where the employees are not represented by a union. In this kind of case, although there may be some intermingling of organized and unorganized employees, the problems created by this intermingling are not resolved under section 55 but by determining the limits of the scope clause of the collective agreement through grievance arbitration. See *Kerr-Progress Printing Limited*, [1975] OLRB Rep. July 590. Here, the collective agreements with the predecessor employer have been replaced so that they can no longer be taken into account, creating a situation somewhat analogous to that where there has never been a collective agreement with a predecessor employer. What must be taken into account now is the collective agreements made by the successor employer to replace the collective agreements inherited from the predecessor employer. The interpretation of the scope clause of these collective agreements is an exercise not contemplated by section 55 of *The Labour Relations Act*, and one that should be left to grievance arbitration.

18. The Board, therefore, concludes that it does not have jurisdiction under section 55 to make the determinations requested by the applicant.

19. The application is dismissed.

0630-77-U; 0784-77-U Labourers International Union of North America, Local 493, (Complainant), v. **Municipality of Casimir, Jennings & Appleby**, (Respondent).

S79 – Duty to Bargain in Good Faith – Parties reaching agreement after protracted negotiations – Employer refusing to execute agreement initially while seeking reconsideration of certificate and subsequently while seeking judicial review – Employer unilaterally implimenting terms – Board finding bad faith and ordering execution of agreement.

BEFORE: E. Norris Davis, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *S. B. D. Wahl and M. Ross for the complainant; K. R. Valin and G. Gauthier for the respondents.*

DECISION OF THE BOARD; June 9, 1978

1. This is an continuation of hearing of Board File 0630-77-U being an application by the union under section 79 of the Act, alleging a violation of section 14 of the Act by the Municipality of Casimir, Jennings and Appleby, and of Board File 0784-77-U being an application by the Municipality under section 79 of the Act, alleging a violation of section 14 of the Act by Labourers International Union of North America, Local 493. The Board had previously ordered the consolidation of the two files in its decision of September 30th, 1977. Upon the agreement of the parties and without having heard evidence in respect to the merits of either application, the Board issued a decision on September 30, 1977 reading, in part:

3. Before the Board commenced to hear evidence, the parties reached agreement on the following matters:

- (a) that negotiations would continue, and that the parties would bargain in good faith and make every reasonable effort to make a collective agreement;
- (b) that any collective agreement resulting from these negotiations would not be implemented until the disposition by the Divisional Court of the application for judicial review relating to the Board's certification of the union as bargaining agent for certain employees of the employer;
- (c) that the bargaining committees for both parties would recommend and support any agreement reached during the negotiations;
- (d) that if an agreement were reached and implemented, both complaints before the Board would be withdrawn.

2. It is necessary by way of painting essential background to allude to certain other proceedings involving these parties, which are a matter of record and in the processing of which this present panel of the Board was not involved.

3. The Board, on January 25th, 1977 issued a certification of the union as bargaining

agent for all employees of the municipality, save and except non-working foremen and office staff. The union, on February 1st, 1977 served notice to bargain and a first meeting of the parties for that purpose was held on February 24th, 1977. On March 3rd, 1977 the municipality filed with the Board an application for reconsideration of the decision granting certification and this application was dealt with, without a hearing, by the Board refusing the request for reconsideration.

4. On June 22nd, 1977 the municipality launched an application for judicial review seeking to have quashed or set aside the preceding decisions of the Board and to require the Board to reconsider its decision to certify the union. The Divisional Court, upon agreement of the parties that the Board would schedule a hearing to reconsider its decision to certify the union, dismissed the application for judicial review on October 18th, 1977. A Board hearing was held in this matter and on February 8th, 1978, a decision issued re-affirming the decision of the Board dated January 25th, 1977 in which the certificate was issued to the union.

5. At the hearing of the present applications held on April 25th, 1978, we were informed by the municipality that an application for judicial review had been launched in respect to the Board's decision of February 8th, 1978. Counsel for the union informed us that no service of such action had yet been effected on the union.

6. We now turn to the bargaining activities of the parties commencing with the first meeting which was held in the municipality's offices on February 24th, 1977. Representing the union at the meeting were Michael Ross, Business Manager of Local 493, Gilles Turcotte, Tom Pothier, David Henri, and representing the municipality were Armand Brisson, Reeve of the municipality, Gaetane Gauthier, Deputy Reeve, Michael Robineau and Ron Lapointe both Councillors. The union presented its written proposals for an agreement and offered to provide explanations. A few questions were asked by the municipality. The union questioned whether the municipality was prepared to negotiate and sign an agreement and the response from Gauthier, who was spokesman, was that they were "prepared to negotiate up to a point but could not sign it". Gauthier in his evidence qualifies the statement somewhat as being that they would not at that particular time be prepared to sign because time was needed for study. In any event, that was the extent of the substantive discussions and the union then endeavoured to get agreement on a firm date for the next meeting and ultimately suggested that the employer establish a date convenient to themselves, but was told that the municipality was not prepared at that time to set up another meeting.

7. No further meetings were held until after the Board's decision of March 17th, 1977 denying reconsideration of the certificate. The municipality instructed their labour relations consultant, Kenneth Valin to draw up counter-proposals which were presented at the second meeting on April 20th. At that meeting the union was represented by Ross, Beauparlant, Gregg and Parisier, and the municipality by Valin, Gauthier and Robineau. The meeting started off by Valin asking Ross to introduce the members of the union committee during the course of which Valin made a point of the citizenship of one of the union committee members, which the union interpreted as an objection to the composition of the committee. In any event, the meeting did proceed and proceeded to discuss the employer's counter-proposals and proceeded in this fashion to Article IX before the meeting was terminated by mutual consent and the parties set up a date for a further meeting with an alternate date.

8. The next meeting was held on May 10th with Ross, Beauparlant and another for the union and with only Valin present for the employer. The parties waited for an hour, in expectation of further employer representatives arriving, without result. Valin testifies that the absence of other representatives he discovered later, had occurred as a result of a secretarial delinquency in his office. While those present waited for the other persons, the union suggested they might apply for conciliation to which Valin did not object and stated if the union did not want to apply, possibly he might.

9. Application for conciliation was filed by the union on May 12th and on June 20th they received notice of appointment. Gauthier testified to a meeting which took place on May 17th: Valin makes no mention of this meeting in his testimony, nor does Ross. Ross does state that he endeavoured to set up a meeting during the period between application for conciliation and notice of appointment, but his phone calls were not returned and that he received no other contacts from the employer.

10. The application for judicial review was launched on June 22nd.

11. A meeting was called by the conciliation officer, Sam Billington, for June 27th. The meeting did take place and resulted in a handwritten document signed on behalf of the union by Ross and on behalf of the employer by Valin, and bearing the heading "Conciliation Officer's recommendation as settlement of all outstanding matters for the preparation of a memorandum of basic settlement". There followed six clauses dealing with wages, term of agreement, union security, dropping of all outstanding matters by both parties then before the Courts or the Labour Relations Board, scope of coverage. Paragraph 3 of this document reads:

"All items in the Employer's Proposals except as amended and

- (a) 1.01 delete foremen and substitute 'non-working foremen';
- (b) 1.02(c) temporary employees and employees hired under Incentive Programs should pay union dues in accordance with Article 5."

Paragraph 5 of this document reads:

"The union and the Employer agrees to present this recommendation to their respective principals."

This document known as the "Billington document" was presented to the parties while they were each in separate rooms. The municipality states the document was merely, as indicated in its heading, the recommendations of the conciliation officer, with which they disagreed and that it was signed by Valin merely as an acknowledgment that it would be carried back to Council. The union states that they understood it to be an agreement of both negotiating committees, arising out of the officer's recommendations, which had only to be ratified by their respective principals.

12. On June 29th the Municipal Council adopted a resolution moved by Gauthier (who attended the Billington meeting), "that the conciliation officer's recommendation as settlement of all outstanding matters for the preparation of a memorandum for settlement is

hereby rejected". Ronald Lapointe, a member of council, voted against the resolution and the Minutes carry a footnote stating "Ronald Lapointe voted – nay: because can't vote on recommendation of conciliation because I never seen it". This led to a further resolution being placed before council on July 11th and which was seconded by Gauthier and which was carried and which read:

"That resolution 193-77 be amended to cancel the footnote of councillor Lapointe regarding the memorandum of agreement between the municipality and Local 493."

Lapointe, who testified before the Board, states that he objected to this amending resolution because, "I was within my rights to vote as I see and no Councillor or Reeve can say I didn't have the right to vote that way". There was a dispute in testimony as to whether Lapointe had made available to him the Billington document prior to the vote on the first resolution. We accept Lapointe's testimony that it was not until after the vote on the motion that the document was made available to him for perusal. The second resolution resulted in Lapointe resigning from council at the end of July and he states that the incident was one of the main reasons and "because you couldn't operate with them – everything was passed before the meeting. I wasn't told nothing".

13. The Billington proposal was not placed before the employees because the Union Constitution makes no such requirement and Ross viewed "his principals" in the terms of the Billington proposal as being the Executive Board of Local 493. Ross did report to the full Board at their regular meeting of July 20th which approved the settlement. There was evidence that Ross and/or another member of the union negotiating committee, when taxed by Valin for not having presented the proposals to the employees, stated that it would have been fruitless in view of council's action.

14. The next meeting was held August 14th, 1977 at which the municipality was represented by Valin and at which the union proposed a joint application for voluntary binding arbitration to settle all outstanding issues. Valin agreed to carry the proposal back to council which rejected the proposal on August 30, 1977.

15. On Friday, August 19th a strike occurred protesting the discipline of the Road Superintendent, Rheel Trudeau. This stoppage continued through until October 27th with August 22nd being the first day following the elapsing of fourteen days from the release of a "no board" report. On August 22nd Gauthier held a meeting with employees, attended by union representatives Henri and Parisier, in which Gauthier asked the reason for the strike without response. Gauthier then stated that if they would return to work, it would be without prejudice for missing a day on Friday, August 19th. As a result of the employees being asked individually to return to work, two employees returned to work, two returned to the picket line and two went home.

16. The next step was the union phoning to the Department of Labour requesting mediation. As a result, the mediator, Bert Stevens, called a meeting for September 14th, which was held with the parties being kept separate and the mediator passing between their rooms. Both Ross and Valin confirm that the union offered to accept all the municipality's proposals, provided the municipality reinstated Trudeau with full compensation. The municipality was not prepared to accede to the Trudeau request and the meetings terminated.

17. Following the adjourned Labour Relations Board's hearing in September, the parties once again returned to the bargaining table and meetings were held on October 12th, 14th and 27th attended by Labour Relations Officer, D. McNabb. At these meetings the union introduced for the first time Mr. Richard Pharand, a local barrister and solicitor, to act as their spokesman. The municipality was represented by Valin, Brisson and Gauthier. During the course of the meetings there were meaningful discussions culminating on October 27th at which time all issues between the parties were resolved by specific written language agreed upon. In the case of three issues, language was accepted specifying how the matters would be dealt with as follows:

- 1) The Recognition clause was subject to language being mutually agreed upon, following an application to the Labour Relations Board under section 95(2) of the Act, as to the eligibility for inclusion in the bargaining unit of persons classified as Road Superintendent and as Arena Manager.
- 2) Union Security clause was to be the subject of further mutual agreement as to the exact wording, but was specifically agreed to be based on the Rand Formulae.
- 3) Wages and benefits of the Road Superintendent and Arena Manager to be subject of further negotiations following decision as to their inclusion or exclusion in the bargaining unit.

18. In the language of Pharand, it was his understanding that he had a collective bargaining agreement and that people were going back to work and that, "I would not have advised the men to go back to work were it otherwise". There was no condition precedent yet to be fulfilled in Pharand's view: it was strictly on the basis that "you go back to work and you have this agreement". Pharand admits that no documents were signed and explains that Valin stated that such were not necessary and "we shook hands on it". Valin's testimony does not detract from that of Pharand and he stated "we had reached a tentative agreement on a number of issues and a tentative agreement to resolve several other items. In essence, at that time the parties were satisfied (in Valin's words) that "all that could be done at a bargaining table had been done". The evidence of both Pharand and Valin was that on arriving at an agreement, they both spoke by phone to the mediator and advised him of the status to the effect, "that's it, the men are going back to work". According to Ross, a membership meeting was held that evening (October 27th) in which Pharand participated, the employees ratified the agreement and the picket line was removed.

19. Arising out of this meeting on the following day, Pharand's office prepared a document incorporating the parties' understandings, a copy of which was forwarded to Valin that day. On November 2nd, Valin returned this document to Pharand bearing some notes and corrections – each page was initialled by Valin – with a covering letter which is consistent with the parties being "ad idem" and which reads:

"As per our recent telephone conversation we enclose herewith our Letter of Intent between the above noted parties for your perusal. Please forward to us your Summary of Items agreed in order that we can take the matter to Council for ratification."

20. At a meeting of council held on November 2nd, 1977 a resolution moved by Gauthier was passed in the following terms:

"No. 431-77

Moved by G. L. Gauthier

Seconded by Clyde Dennie Jr.

That Council ratifies articles agreed being articles 2 through 19 except article 5, between the negotiating committee and the Union in the preparation of the Collective Agreement, and Council accepts the method of resolving articles 1, 5, and 22 as proposed by the negotiating committee and the Council further moves that none of the aforementioned articles shall be implemented or take effect until the negotiating committee has resolved the aforementioned outstanding articles and Council has had an opportunity to ratify the Collective Agreement in its entirety and that Council further moves to ratify a letter of intent between the Municipality and the Union dated Nov. 2, 1977 and such letter shall not take effect until a Collective Agreement is executed between the Union and Municipality.

carried"

The Board notes that the acceptance of the terms of October 27th, 1977 by the Municipality was coupled with a withholding of implementation. There is no evidence that such a delay in implementation had ever been raised at the bargaining table and in fact Pharand's evidence that there were no conditions precedent to be fulfilled fortifies the conclusion that the matter was not raised. No evidence was placed before the Board as to when, if at all, the issue of delay in implementation was communicated by the Municipality to the Union. Had such issue been in contemplation by the Municipality during the three days of negotiations leading to a settlement of the strike there was a clear obligation under section 14 that it be raised. For the matter to come up after the bargain had been struck and by way of a declaration of intent by the municipality as to the course it would follow is untimely, and in itself connotes bad faith dealing.

21. Following the release of the Board's decision dated February 8th, 1978 respecting reconsideration of the certificate, a meeting was held on February 23rd at which Ross and Trudeau were present for the union and Valin for the municipality. According to Ross, Valin advised that the municipality was not happy with the Board's decision of February 8th, 1978 and intended to appeal to the Courts and that they would not now sign the agreement. Valin, acting on instructions from the municipality, requested the union's consent to implement a 6% wage increase as contained in the proposed collective agreement. According to Ross, after telephone consultation with his solicitor, he advised Valin that they could not agree until the collective agreement had been signed. Valin's recollection was that Ross attempted to contact his solicitor and was unable to do so and undertook to be in touch with Valin in a week. Valin also states that he did not hear further from Ross and that the municipality unilaterally put the increase into effect.

22. At the February 23rd, 1978 meeting between Valin and Ross the sole reason ad-

vanced for the municipality's refusal to sign the collective agreement was the intention of the municipality to launch a further action for judicial review. The evidence does not disclose any reference at that time to the municipality's stated intention in the resolution of November 2nd 1977 to defer implementation, and indeed that position was at least partially abandoned by the Municipality's request for union acquiescence in implementation of the wage provisions of the agreement. Valin, both in evidence and in argument makes clear that the sole reason for refusal to sign a collective agreement is prejudice of the case before the Divisional Court.

23. The first question for the Board is whether, as a result of the exchange of documents and oral assurances in the October sequence of negotiations, a collective agreement now exists between the parties. It is clear to us, and we so find, that all outstanding issues between the parties were resolved and that it was intended that a collective agreement would be executed. The fact that in the resolution of three issues the agreement is that they will be the subject of further discussion, does not detract from the fact that that agreement in itself is a settlement of the issue and was to be part of a collective agreement. There was no evidence of an understanding that the process of resolution was to be completed prior to a collective agreement being executed: the contrary inference may be more appropriately drawn that the parties conceived these vehicles as the means of removing the obstacles which were precluding the execution of such a document. It is equally clear that all of the events surrounding October 27th point to the fact that the parties intended that the results of their efforts would be the execution of a collective agreement. Pharand obviously operated on the assumption that these discussions in the presence of the Reeve and Deputy Reeve of the municipality were the equivalent of a representation that ratification by Council was merely a formality and that all that remained to be done was to provide a form to the understandings suitable for execution.

24. Important as is the fact that all issues have been resolved and that the parties intended that a collective agreement would be executed, is that, in order for this Board to declare the existence of a collective agreement, it must be satisfied that what the parties have done meets the definition of collective agreement in section 1(1)(e) of the Act which reads:

"1.-(1) In this Act,

- (e) 'collective agreement' means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees."

25. It is the settled Board's jurisprudence as is well stated in *Rossi's Bakery* [1966] OLRB Rep. July 266 at para 8, that:

"... nothing in the Act lays down explicitly or implicitly that there can be only one document involved. The only explicit formal requirement is that the agreement be in writing. *Implicit is the requirement of signatures ...*"

(emphasis added)

It is the implicit requirement of signatures which is absent in this instance and which precludes the Board from finding that a collective agreement is in existence. The last document, which was prepared following October 27th, 1977, contains agreed-upon language for various clauses as are normally to be found in a collective agreement and contains no draft signature section for execution. Each page has been initialled by the municipality's spokesman signifying agreement with the draft language, but neither the union nor the municipality has signed the document. The letter of intent, forwarded with the letter of November 2nd, 1977, is signed by Valin as representative for the negotiating committee of the municipality. This series of documents does not provide signatures of both parties such that the Board could find a collective agreement within the Act to be in existence.

26. At the hearing, union's counsel took the unusual step of filing, as documentary evidence copies of the pleadings bringing these matters on for hearing. Counsel argues that both the union's and municipality's pleadings have been signed by agents of the parties and therefore, the municipality clearly recognized the existence of an agreement in seeking union consent to implementation of the wage increase and by its claim of relief from the Board for "an order that the respondent ... agree to the implementation of the tentative agreement". In our view, the filing of allegations of fact having reference to the document in issue over the signature of a party cannot be tortured into an interpretation that by so doing the "tentative agreement" has now been executed and transformed into a collective agreement. There was an issue prior to the filing of these pleadings as to whether a collective agreement had been brought into existence and it cannot be said that by bringing the issue to be tried, that that act, in itself is curative of any existing defects. The pleadings demonstrate that both parties are *ad idem* as to the fact that there was an agreement of some sort arrived at but the question we must answer is whether it was a "collective agreement". The pleadings of the union themselves deny the existence of a collective agreement in its allegation by setting out, "As of Nov. 2 and continuing to date the Employer refuses to sign the said collective agreement ...". The Board finds that there is not now existing a collective agreement between the parties.

27. We now direct ourselves to the cross-allegations by the parties of violations of section 14 of the Act which lays an obligation on both parties, "to bargain in good faith and make every reasonable effort to make a collective agreement".

28. In an effort to narrow down the issues at the hearing, no evidence was adduced in respect to those particulars of allegations on which the municipality relied in respect of a complained of violation of section 14 by the union. Accordingly, the complaint in Board File 0784-77-U is dismissed.

29. In most applications which come before the Board alleging a violation of section 14, there is an underlying inability of the parties, up to that point in time, to find means of resolving some or all of the issues which are bound up in their negotiations. In the instant case, while there are allegations of misconduct, the parties have in fact arrived at mutual agreements as to the resolution of each and every issue. The sole issue now separating the parties is that of incorporating the mutual agreements evidenced by written language completely agreed to into the form of an executed collective agreement. The November 2nd, 1977 council resolution accepted all the mutually agreed clauses, including the effective date and the term of the agreement, but provided for a delay in implementation of the agreement until the results of those actions which they agreed to in Articles 1, 5 and 22 are known. These clauses are quoted in their entirety:

“ARTICLE 1 – RECOGNITION – (acceptable) wording to be agreed upon after O.L.R.B. decides issue pursuant to Section 95(2) of L.R.A.

The Municipality and the Union have agreed that the question as to whether or not a Road Superintendent and an Arena Manager are to be included in the bargaining unit, is to be referred to the Ontario Labour Relations Board provision of Section 95(2) of the Labour Relations Act. After the Board has rendered its decision pursuant of Section 95(2), the Municipality and the Union shall agree that there will be a following provision in Article 1.

(a) There will be a clause excluding students from the bargaining unit on conditions that they are not hired to displace members of that unit and where a member on lay-off could be recalled to do the job.

(b) Special provisions with respect to employers and employees hired under Federal, Provincial or any other Government Incentive Plans or Programs and temporary employees. (Employees hired to relieve regular employees for a fixed period. i.e. illness).

Mr. Valin is to supplement a clause which is to be reviewed by the Union.

ARTICLE 5 – UNION SECURITY – (acceptable) – wording of clause is to be agreed upon

The parties agree that there shall be a Rand Formulae where dues deducted after the completion of the probationary period are dues which are to be remitted to the Union on the 15th day of the month following pay.

There will be further provisions that the Union dues will be at a fixed dollar amount and there will be a clause of indemnification and save harmless of the Municipality with respect to Union dues.

It is also agreed that the following provision will be agreed upon.

The Union acknowledges that it is the right and privilege of any employee in the bargaining unit to become, refrain from becoming or ceasing to be a member of the Union.

ARTICLE 22 – WAGES – acceptable

Note: With respect to an Arena Manager and a Road Superintendent where not included in Article 22, it is agreed that after the O.L.R.B. has decided the issue pursuant to section 95(2) that the parties will, if applicable, negotiate the working conditions, wages, hours of work and

benefits of both either/or the Road Superintendent and the Arena Manager.”

30. It is evident that the above clauses are definitive of the format under which, at the appropriate time, the parties can arrive at a further mutual understanding: when one reads Article 1, along with Schedule A to the Agreement which sets out the occupational classifications and rates, there is no question as to who is covered by the agreement. It is clear to us that it was the intention of both parties as of October 27th, 1977 that the collective agreement would be executed in which Articles 1, 5 and 22 would be included in precisely the language quoted above. The employees ratified that agreement, and returned to work; the council similarly ratified that agreement, although wanting to delay implementation until results of what they have agreed to can be known.

31. The question arises as to why these matters were permitted to lie dormant between November 2nd, 1977 and March 22nd, 1978 when the union moved for a continuation of hearing into the section 79 complaints. The answer lies in the agreement of the parties leading to the original adjournment of the matters and in particular that clause which stated:

“That any collective agreement resulting from these negotiations would not be implemented until the disposition by the Divisional Court of the application for judicial review relating to the Board’s certification of the union as bargaining agent for certain employees of the employer.”

The Divisional Court did dispose of the matter by dismissing the application on October 18th, 1977, on agreement of all parties that a reconsideration hearing would be held by the Board. That hearing was held and decision issued on February 8th, 1978. While the matter was disposed of by the Courts in October, the surrounding agreement of the parties indicated that the spirit of the above quoted agreement would be best met by withholding implementation of a collective agreement, until the Board dealt with the reconsideration matter.

32. On February 23rd, 1978 the municipality advised the union that they would not then sign an agreement in view of the intention to launch a judicial review of the Board’s decision of February 8th, 1978. At the hearing before us, the municipality stated that this position was taken on the advice of counsel to prevent prejudice of their case on judicial review: the municipality also argued that the current application for judicial review was in effect, merely an extension of the preceding application which the parties had agreed in September 1977 should be disposed of before any collective agreement was implemented. The Board does not accept this latter argument and finds that the agreement between the parties and made before the Board was conditioned only on the disposal of the specific application for review then before the Divisional Court.

33. To summarize, it is our finding of fact that as of October 27th, 1977 the parties had arrived at a complete consensus as to all issues between them, that the consensus was accepted by the employees who then terminated their strike, the consensus was accepted by the Township Council in their November 2nd, 1977 resolution, and that there is a continuing refusal by the municipality to sign a written agreement encompassing the terms of the consensus.

34. The question before us is whether the refusal to sign, under the circumstances where the certificate of January 25th, 1977 is the subject of a judicial review proceeding, constitutes a violation of section 14 of the Act. We note that under similar United States legislation the National Labour Relations Board there has for many years held the view that the "failure to sign a written memorandum of the agreement made has been uniformly regarded as a per se refusal to bargain". We believe that such a "failure to sign" similarly constitutes a violation of section 14 of the Ontario Labour Relations Act. So, we come down to the narrow question as to whether a bona fide belief held by one of the parties that to sign such a document could prejudice the outcome of an on-going judicial review is, in itself, sufficient to lead the Board to the conclusion that such refusal cannot be the basis for a finding of a section 14 violation.

35. In the particular case before us the employer's argument of possible prejudice is certainly lessened substantially by virtue of the fact that the employer has, on his own initiative, now implemented the wage increase terms of the agreement. In any event, in this particular case, should the judicial review be determined in the employer's favour, any collective agreement which may have been entered into could not survive such a determination. This result would flow from the fact that the employer's position before the Board, and its intended position before the Courts, is that the Board exceeded its jurisdiction in certifying the trade union because there was employer participation in the trade union's formation, and that consequently the Board was precluded by section 12 of the Labour Relations Act from certifying such trade union. If the Court finds in the employer's favour then any collective agreement entered into by that trade union would itself be voided by virtue of section 40 of the Labour Relations Act which reads:

40. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employer's organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

In the result, therefore, the Board is not persuaded that the existence of the judicial review action in this case is of such an order as to preclude a finding of bad faith bargaining.

36. In coming to this conclusion, in this case, the Board has taken into consideration the balance of prejudice to the employer, the employees and the union. The Board deals generally with matters in which the mere effluxion of time alters the substantive rights of the parties and which, in the language of Laskin, J.A. in *Nick Masrey Hotels Ltd.* [1970] 3 O.R. 461, "cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of a contract where the situation is fairly well frozen when the tort or breach of contract has occurred." In the instant case both the employer and the union have over the 17 months intervening since the issuance of the certificate observed the normal rights and liabilities which flow from such certificate. There have

been bargaining sessions restricted to the parties, as well as conciliation services, mediation services, proceedings before this Board arising out of such activities and a two month strike by the employees – all of which have been directed to the ultimate objective of making a collective agreement. In our view the process should not now be truncated before the results of all of these efforts come to fruition, and that, on balance, the obligations under section 14 of the Act should continue to be effective.

37. It is clear that parties can bargain in good faith and yet not arrive at mutual agreement on issues. That is not this case where the parties have arrived at mutual understanding on all issues but refuse to incorporate them into a collective agreement. In our opinion the obligation to “bargain in good faith and make every reasonable effort to make a collective agreement” on its face, requires that unless both parties intend that the result of their arriving at a mutual understanding will be incorporated into a collective agreement, their conduct is violative of section 14 of the Act. The Board does not have to, in this case, involve itself in any inferential reasoning as to the intent of the municipality to execute a collective agreement. The evidence is clear that the municipality at this time wishes to indefinitely postpone the execution of a collective agreement on the basis that a further action for judicial review of a Board decision has been implemented. At the same time, the municipality has unilaterally implemented an increase in wages (in the amount agreed to by the parties in the unexecuted agreement) and is in the process of seeking A.I.B. approval in respect to a further wage increment (also in an amount agreed to by the parties in the unexecuted agreement). In these particular circumstances, the failure to execute a collective agreement in the terms previously agreed to is a violation of section 14 and we so find.

38. What is the appropriate remedy to be granted? We are urged by the union that an order be made directing the municipality to execute a collective agreement. The Board, in the past, has turned away from granting remedial relief which involves the Board in any way participating in the fashioning of a settlement. This position is well-founded and has been comprehensively stated in *The Journal Publishing Company of Ottawa, Limited*, [1977] OLRB Rep. June 309 at pp. 332-333 where it is said:

“55. This request for ‘make-whole’ relief has serious implications for the collective bargaining process in this Province. This process, as it is defined in the *Labour Relations Act*, clearly provides that labour disputes are to be ultimately resolved by recourse to economic sanctions – The strike and the lock-out. Compulsory interest arbitration has never been an ingredient of this statutory scheme. Does the existence of bad faith bargaining allow the Board to deviate from the clear scheme of the Act when exercising its remedial authority? We think not.

56. The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obligation is breached, therefore, it cannot be as-

sumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board's remedial authority where it is attempting to redress a failure to bargain in good faith.

57. Not only would the imposition of an agreement be inconsistent with the scheme of the Act, but it would be a remedy that would be difficult for the Board to implement. What would be the terms of the collective agreement that the Board would impose? The unions argue that it would be the agreement that would have been reached if the failure to bargain had not occurred. It is possible, however, that, even if there was a breach of section 14, a collective agreement might not have resulted. And, even if we were to conclude that a collective agreement would have been reached, we might also conclude that the terms of that agreement would be most unfavourable to the unions. The problem with the remedy proposed by the unions is that it would require the Board to engage in an exercise of speculation. The Board would be venturing into the uncertain sea of interest arbitration without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration.

58. The use of interest arbitration as a section 14 remedy would also pose dangers to the collective bargaining process itself. There would be a great temptation for parties to abandon the bargaining table for the Board where the bargaining process was not working in their favour. In other words, parties might well seek to gain concessions at the Board that they could not gain at the bargaining table. We do not consider that the Legislature ever intended to supplant the bargaining process by imposing a duty to bargain in good faith, and providing the Board with extensive remedial powers. This duty, and the Board's remedial powers, exist to complement the bargaining process, not to displace it."

39. The major distinguishing factor between that case and the one before us, lies in the fact that no "interest arbitration" is here involved. There is no need in this case for the Board to fashion solutions for issues which are separating the parties as there are no such issues: there is no need for the Board to substitute its value judgments on particular issues for those which might be hammered out between the parties as they have all been hammered out. In addition, the imposition of a collective agreement in such circumstances in the terms which have already been agreed to by the parties, is not a supplanting of the voluntary bargaining process but rather a re-affirmation of it.

40. In the total scheme of the Act the obligation to "bargain in good faith" would have little relevance save for its linkage to the dual obligation to "make every reasonable effort to make a collective agreement". In this case the bargaining process has been exhausted and all that remains to carry out the purpose of the legislation is that the results of that bargaining now be incorporated in a collective agreement. The Board therefore directs that the document filed with the Board as Exhibit 24, save for the last paragraph which reads,

“N.B. The above-noted articles were prepared by the law firm of Pharand, Kuyek and Lebel, based on notes made at various meetings held between the Municipality and the Union. It is understood that there may be errors or omissions. If the Municipality does not agree with any of the wording or the principle as inunciated in the articles, we would request that they discuss the meaning with Mr. R. A. Pharand, in order that the matter be cleared up immediately. If there are errors or omissions they are not the responsibility of the Union and we hope that we will not interrupt [sic] the negotiations.

E. & O.E.”

be prepared for execution and that the municipality and the union forthwith execute that document as a collective agreement by the placing of signature of authorized representatives thereon.

1911-77-U T.W. Shields, (Complainant), v. Commercial Shearing Ltd., (Respondent).

Health and Safety – Employee refusing to perform work alleged to be unsafe – Board found no reasonable cause for such belief.

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *Todd Shields for the complainant; Mary Hall for the respondent.*

DECISION OF THE BOARD: June 1, 1978

1. This is a complaint under section 9 of the *Employees' Health and Safety Act*, 1976. The complainant, Todd Shields, alleges that he was dismissed by Commercial Shearing, a producer of hydraulic pump motors and valves, because he had acted in compliance with the Act.

2. The events which gave rise to the dismissal occurred on January 10, 1978. That afternoon, Bruce Hayward, the employer's foreman, was informed by Sheldon Barker, the lead hand in the pump area, that Shields, who was then scheduled to begin testing of C-101 valve units, was “fooling around” and that Hayward should come to the testing area. Upon his arrival, Hayward was informed by Shields that the test fittings were unsafe and that he would not use them. Shortly thereafter, Hayward was instructed over the telephone by Bill Lathrop, the employer's manufacturing manager, to explain to Shields that the two fittings which were used on the outlet side of the pump – the high pressure side – had been used by Shields that very morning on another job (testing of 15-Hs), and that there should be no problem with the other fitting, the one on the inlet side, since the inlet was low pressure only – 100 lbs per sq. in. This was explained to Shields. However, he still refused to test.

[It should be noted that the only fitting, the safety of which was in question at this point – at least in the employer’s mind – was the fitting for the inlet side of the pump – the low pressure side. Although there were apparently complaints voiced by Shields on January 10th about the grinding down of an outlet fitting, the employer did not become aware until mid-way through the Board’s hearing into this matter that an outlet fitting was the one which Shields considered unsafe. We shall have more to say about this later.] After Shields refused for the second time to test, Hayward telephoned Lathrop who instructed him to advise Shields that there was not much work in the plant right then and if he didn’t want to use the fitting, he could go home for the rest of the afternoon. Shields’ account of what occurred after this phone call differs somewhat from that of Hayward’s. Hayward testified that he told Shields, after speaking to Lathrop, that if he didn’t want to test, he could go home, to which Shields replied, “I am not going home unless I am fired.” He then phoned Lathrop again and was instructed to “oblige” Shields, which he did. Shields denied giving Hayward an ultimatum. He testified that after Hayward fired him, he inquired whether he was being fired because he refused to use a fitting which he considered unsafe, to which Hayward replied, “Yes.”

3. As indicated, the fitting which Shields says he considered unsafe on January 10th was a fitting which had been ground down for use on the outlet (high pressure) side of the C-101. His evidence at the hearing was that when he first attempted to connect this fitting to the feeder hose, it would not connect and that it could not be connected until after Barker had ground down the retaining ring. It was because the fitting had been ground down, Shields stated, that he considered it unsafe for use. It is of some significance, we think, that this allegation did not surface until after the employer had led evidence through Lathrop that the only side of the C-101 which sees pressure is the outlet side, and that the use of a fitting on the inlet side could not possibly present a safety risk to the tester. The allegation about the ground down fitting being unsafe was not raised until the cross-examination of Mr. Hayward, the third witness called by the employer. Until that point in the proceedings, the employer (and the Board) were proceeding on the assumption that the fitting which Shields considered unsafe on January 10th was the one used on the low pressure side of the pump. Lathrop’s evidence, which is supported by Hayward’s report of Shields’ firing (dated 2:43 p.m. January 10, 1978), was that Shields’ complaint – at least insofar as the safety of test fittings was concerned – related to the inlet fitting. Shields did not, however, take issue with any of Lathrop’s evidence. This despite the fact that he was advised by the Board that a failure to do so would likely result in the Board accepting the evidence, which, at that time, appeared fatal to Shields’ complaint. It should be emphasized that Lathrop produced for the Board a colour coded diagram showing the areas of the C-101 which involve pressure, as well as the actual valve unit which Shields refused to test. It is of course possible – indeed Shields so stated – that he did not appreciate the significance of Lathrop’s evidence – that Shields’ complaint regarding was in respect of the inlet fitting – a fitting which did not see pressure. However, this does not appear in accord with the preponderance of probabilities in the case. Not only does it strike the Board as likely that Shields would fail to grasp the significance of such demonstrative evidence, the surrounding circumstances point to the conclusion that he did.

4. The three letters to the Department of Labour which contain the particulars of Shields’ complaint under the Act do not indicate what Shields’ concern on January 10th was with the grinding down of a fitting. Although the letter dated January 17th alleges that 30%-40% of the employer’s test fittings were unsafe, the letter which details the events of

January 10th (dated January 12, 1978) alleges that the kind of fittings required for the testing of C-101s were not available in the employer's shop. It states that, although the proper fittings for testing 15-Hs – the fittings which Shields tested on the morning of January 10th – were available, the proper fittings for testing C-101s were not, the existing fittings “being standard cold water pipe fittings and not high pressure fittings”. We have already noted that the fittings which Shields refused to test C-101s with on the afternoon of January 10th were the same fittings used by Shields that very morning to test 15-Hs, units which require high pressure test fittings. It should now be stated that the only difference between the fittings used on the outlet – high pressure – side of the C-101 and the fittings used on the inlet – low pressure – side is in the circumference of the fittings. Apart from size, the fittings are identical in construction and in their ability to withstand pressure.

5. The Board did not require the employer, who proceeded first in this matter, to come forward with evidence to rebut the numerous allegations of unsafe conditions contained in Shields' letter to the Department dated January 15th. These alleged unsafe conditions were not put forward as reasons for Shields' refusal on January 10th to test C-101 valve units. However, the employer did adduce certain evidence in respect of these allegations for the purpose of impugning Shields' credibility. Shields' letter of January 25th states that the wooden platform that the test operator stands on had a hole in it approximately 8" round and that “as a sop to good practice and safety the management from time to time will cover this hole with a piece of boxing cardboard ¼" thick, which is all too soon saturated with hydraulic oil”. At the hearing, Lathrop stated that management did not become aware of the presence of this hole until after Shields was fired, and then only as a result of Shields' complaint to the Industrial Safety Branch. Lathrop testified he was told by Barker at that time that it was Shields who had created the hole – by dropping a pump and that he had not told anyone. Under cross-examination, Shields acknowledged that he had indeed created the hole and that he had not reported it to management, although he said he told Barker.

6. On the basis of the foregoing considerations, as well as on the basis of the demeanour of the witnesses, the Board has serious reservations as to whether the fitting which Barker ground down on the afternoon of January 10th was really the fitting which Shields considered unsafe for use on C-101s – if indeed he considered any fittings unsafe. In this latter regard, there are two additional features of the evidence which may be of significance.

7. Shields was hired in August of 1977 on a temporary basis. He was hired as a general handyman and as a favour to his father who is a friend of the former managing director of the employer. On December 8th, Shields was informed that he would be terminated on December 23rd as there was no work for him in the plant. A week later, Shields was informed that he would be kept on after the Christmas shutdown, but only on a temporary basis, as per the original terms of hiring. As of January 10th, then, Shields prospects for continued employment were not good.

8. The evidence of Bob Johannsson, an employee who tested C-101s on January 10th with the same fittings that Shields refused to use, and without mishap, testified that, because of the requirement for constant bending over, the testing of C-101s is a difficult job and one which the testers do not like to perform. It should be noted here that Shields spent only a small percentage (5%-8%) of his time testing valve units. The majority of his time was occupied with general handyman work.

9. Even if Shields' concern on January 10th was, as he alleges, with a fitting for use on the high pressure side of the C-101, the Board is of the view that he did not have reasonable cause to believe that such fitting was unsafe. Quite apart from his specific complaint about the grinding down of a fitting on January 10th, Shields alleged at the hearing (as he did in his letters to the Department) that many of the fittings used by the employer for high pressure testing were unsafe. It was brought out in cross-examination that Shields had used these "unsafe" fittings on half a dozen occasions prior to January 10th – to test C-101s a dozen occasion prior to January 10th – to test 15-Hs – and also that he had not complained to anyone from management about the safety of test fittings prior to January 10th, although he did launch an anonymous complaint with the Industrial Safety Branch. Shields stated at the hearing that "he did not become aware until January of the job and the pressure" and at that time "he did not see how the fittings could be safe". He acknowledged, however, that he had never heard of anyone being hurt at Commercial Shearing as a result of using a fitting – high pressure or otherwise. It should be noted here that the test fittings used by the employer were inspected both before and after January 10th by G.S. Walker, an inspector with the Industrial Safety Branch, the first time (December 19, 1977) as a result of an anonymous complaint (Shields') and the second time (January 24, 1978) as a result of Shields' complaint under the Act. On both occasions, the employer's test fittings were inspected and judged to be safe, and on both occasions Mr. Walker's report was posted on the bulletin board for employees to see. The first notice was removed by someone other than the employer. The Board, after considering these facts, as well as the considerations outlined above, has concluded that Shields did not have reasonable cause to believe that the test fittings used by the employer were, in any general measure, unsafe. As for Shields' allegation that an outlet fitting was unsafe on January 10th because it had been ground down, the evidence establishes that there was nothing to prevent Shields from changing such fitting if he truly considered it unsafe. As even Barker, a witness who tried his utmost to support Shields, was forced to concede, if the fitting which he [Barker] ground down and gave Shields to use on the outlet side of the C-101 had been considered unsafe, he or Shields could have obtained another from the company's stock of fittings which are located on the shop floor. The company's practice which is well-known to employees is that any employee has the right at any time to change any fitting which he considers unsafe. Despite Shields' contention to the contrary, the Board is satisfied that there were other fittings available on January 10th for use on the outlet side of the C-101 which Shields could have used. In any event, Shields could have made up a new fitting from the company's supply of spare parts. Johannsson testified that a new fitting can be made up in the space of a couple of minutes, and Shields admitted that he knew how to make up new fittings and that he had done so on previous occasions.

10. On the basis of the foregoing, the Board finds that, whatever the reasons for Mr. Shields' refusal on January 10th to test C-101 valve units, he did not have reasonable cause to believe that any of the test fittings were unsafe. Accordingly, we find that Shields was not dismissed because he acted in compliance with the Act. This complaint is therefore dismissed.

0175-78-R Labourers' International Union of North America, Local 1081, (Applicant), v. **Connolly Contractors Limited**, (Respondent), v. Ontario Provincial Conference I.U.B.A.C., (Intervener).

Certification – Construction Industry – Bargaining Unit – Board refused to sever one geographic area from an existing province wide bargaining structure.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Peter Hitchen, Ernest Bairos and Lavern Schertzburg appearing for the applicant; G. Grossman, John Grossi and Olvino de Carli appearing for the respondent; Danny de Monte appearing for the intervener.*

DECISION OF THE BOARD: June 5, 1978

1. The name "Connolly Contractors Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read "Connolly Contractors Limited".
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The Board further finds that this is an application for certification within the meaning of section 108 of the Labour Relations Act.
4. The applicant is seeking certification with respect to a bargaining unit of "all labourers engaged in the laying of tile and terrazzo and conveying of material connected therewith at the Conestoga Mall, King Street West, in and around the municipality of Waterloo, Ontario, County of Waterloo, geographic area number 7 – save and except non-working foremen and persons above the rank of non-working foreman". In its reply the respondent adopted the position that the appropriate bargaining unit is "all marble, tile and terrazzo, cement masons and resilient floor layers and their helpers, their respective apprentices, improvers and working foremen in the employ of the respondent in the Province of Ontario". The intervener adopted the position that at all relevant times it was the bargaining agent for employees of the respondent and that at all material times the applicant never represented the majority of employees.
5. The respondent, which has its place of business in Metropolitan Toronto, is in the business of installing terrazzo, tile and marble. The job which forms the subject matter of this application is in the City of Kitchener. The respondent commenced work on the Conestoga Mall and required the services of three helpers in addition to its regular work force which originated in Toronto. The respondent hired two men "at the gate" and hired a third man through the applicant. These three men from the Cambridge-Kitchener area are members of the applicant.
6. There is no dispute that on the date of the filing of this application the respondent was bound by a collective agreement between the intervener and the Terrazzo, Tile and Marble Guild of Ontario, Inc. Article 1(a) of this collective agreement provides that "the

employer recognizes the Union as the exclusive bargaining agent for marble, tile and terrazzo, cement masons and resilient floor layers and their helpers, their respective apprentices, improvers and working foremen in his employ in the province of Ontario working in the areas described in Appendix B hereto". Appendix B sets forth various geographic areas within Ontario. In addition, the respondent is bound by a certificate of accreditation with respect to terrazzo, tile and marble workers and their helpers in the province of Ontario. (See Board File No. 6038-74-R).

7. Although the applicant disputes the total number of helpers on the Conestoga Mall it did not dispute the total number of employees in the bargaining unit which the respondent has suggested as being appropriate for collective bargaining. While the Board has permitted the severance of craft units in the construction industry, see, for example, *Kent Tile & Marble Co. Ltd.* 61 CLLC ¶16,204; and the *Nadeco Ltd.* case [1970] OLRB Rep. April, p. 41, it has not permitted the severance of one geographic area from a province wide geographic area in a collective agreement where there has been a history of bargaining on a province wide area. See, for example the *Pigott Construction Company Limited* case, [1972] OLRB Rep. June, p. 565.

8. In the instant application the Board finds that the bargaining unit proposed by the respondent is appropriate for collective bargaining. While the applicant claims that its three members should be classified as construction labourers, it concedes that its three members were performing the work of helpers as provided for in the collective agreement. The Board finds that the applicant's three members worked for the respondent as helpers and were covered by the collective agreement which was binding on the respondent. The applicant's three members were, due to a misapprehension of the rates in the area, initially paid according to the applicant's prevailing rate for construction labourers. The rate was forthwith amended and the wages which were due to these three members were adjusted before the issuance of the first pay cheques. In these circumstances, the Board finds that the initial rate which was paid in error to the three members is not sufficient to characterize their function as construction labourers rather than helpers.

9. For the foregoing reasons the Board finds that less than forty-five per cent of the employees of the respondent in any bargaining unit the Board might find appropriate for collective bargaining, at the time the application was made, were members of the applicant on May 16, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. This application is dismissed.

1146-77-R Christian Labour Association of Canada, (Applicant) v. **Coons Heating & Sheet Metal Limited**, (Respondent).

Certification – Interference with trade union – Employer influencing employees to join applicant union – Certificate revoked.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *W. R. Herridge, Q.C., S. Gluck and S. DeJong appearing for the applicant; Ivan F. Ivankovich and Marc Coons appearing for the respondent; Stanley Simpson and John Richardson appearing for Mr. J. Richardson.*

DECISION OF THE BOARD: June 28, 1978

1. On October 18, 1977 the Christian Labour Association of Canada ("CLAC") applied to the Board pursuant to the construction industry provisions of The Labour Relations Act to be certified to represent the employees of the respondent. Following the filing of a reply and certain other material by the respondent the Board certified CLAC as the bargaining agent on behalf of all sheet metal workers and sheet metal apprentices in the employ of the respondent in Board area #5. As is permitted by section 91(13) of the Act with respect to construction industry certification applications, no hearing was held in connection with the application.
2. On November 16, 1977 the Board received a letter from counsel for Mr. M. J. Richardson, one of the employees in the bargaining unit, requesting that the Board reconsider its decision to certify CLAC. The matter was then put on for hearing for the purpose of entertaining the evidence and the representations of the parties with respect to this request.
3. It is worth noting at this point that shortly prior to the filing of the request for reconsideration, Mr. Richardson became a member of the Sheet Metal Workers International Association ("the Sheet Metal Workers Union"). Throughout the hearing Mr. James Fletcher, who is an officer or official of Local 537 of the Sheet Metal Workers Union, acted as an advisor to Mr. Richardson's counsel and was so referred to by counsel.
4. The respondent operates a small sheet-metal firm based in the City of Welland. It is engaged in the installation of ventilating, heating and air conditioning systems. The sole shareholder of the respondent is Mr. Marc Coons.
5. Late in September of 1977 Mr. Coons became aware of the fact that the respondent had been the low bidder on a job to act as a sub-contractor in the installation of heating ducts at the General Motors plant in St. Catharines. He was, however, informed by the general contractor on the job that the sub-contract could only be awarded to a unionized firm. Mr. Coons testified that at that point he called together his five employees and informed them of the situation and that one or more of the employees suggested that he contact both the Sheet Metal Workers Union and the "Christian Labour Trades".
6. Mr. Coons then set about to contact a representative of Local 537 of the Sheet Metal Workers Union at its office in Hamilton. He was advised, however, that of the two persons he should talk to one, Mr. John Bulanda, was on holiday and the other, Mr. Fletcher, was ill. Mr. Coons left a message with the local's office to have Mr. Bulanda contact him. Mr. Coons also telephoned the office of the Christian Trade Unions of Canada in Hamilton. That union, however, merely took down Mr. Coons' name and passed it on to Mr. Stan DeJong, one of CLAC's representatives in St. Catharines.

7. On Thursday, October 6, 1977 Mr. DeJong placed a telephone call through to Mr. Coons and arranged to meet him at a restaurant in St. Catharines on the following day. Mr. Coons testified that he told Mr. DeJong on the telephone that he was the owner of a sheet metal firm, although Mr. DeJong stated that he only became aware of this fact during the meeting itself.

8. The meeting between Mr. Coons and Mr. DeJong lasted for about an hour. According to Mr. DeJong he explained to Mr. Coons the philosophy and historical background of CLAC and also gave to him some of CLAC's promotional literature. Mr. DeJong testified that he advised Mr. Coons to use this literature with discretion. Mr. DeJong also referred Mr. Coons to those sections of The Labour Relations Act which prohibit the interference by an employer with the formation of a trade union and warned Mr. Coons that he should not exert any influence, pressure or intimidation on his employees to get him to join or not to join a trade union. He also advised Mr. Coons that even their very meeting together might be misconstrued by others.

9. Mr. DeJong testified that just before the meeting came to an end he again told Mr. Coons not to exert any pressure on his employees and advised him that the information given to him was solely for his own personal use. Mr. DeJong then left Mr. Coons one of his business cards, on the back of which he had written the names of two other CLAC representatives based in St. Catharines. Mr. DeJong explained that he had added the two names to indicate to Mr. Coons that CLAC's office in St. Catharines was staffed by three people. When asked during cross-examination why he had left a business card with Mr. Coons, Mr. DeJong replied that he leaves his card "left, right and centre, wherever I go". Mr. DeJong stated that he advised Mr. Coons not to give his business card to any employee. Mr. Coons, however, testified that he could not recollect any such warning.

10. In giving his testimony Mr. DeJong at first insisted that the purpose of his meeting with Mr. Coons had been simply to exchange information concerning CLAC. Under close questioning, however, he conceded that he knew at the time that Mr. Coons was interested in having his employees represented by CLAC. He also acknowledged that he and Mr. Coons had discussed the type of work done by the respondent as well as the number and classifications of its employees.

11. On or about Friday, October 14, 1977, Mr. Coons approached Mr. Richardson to discuss the job at the General Motors plant. Mr. Richardson is a young sheet metal worker whose leadership abilities appear to have been recognized by everyone involved in the events giving rise to these proceedings. Mr. Coons advised Mr. Richardson that although he had been unable to contact anyone at the Sheet Metal Workers Union, he had managed to contact a representative of CLAC. At that point Mr. Coons gave Mr. Richardson Mr. DeJong's business card and advised Mr. Richardson that he should contact Mr. DeJong. Mr. Richardson testified that Mr. Coons had added "we would have to make it fast" if the respondent was to get the job at the General Motors plant.

12. Mr. Richardson then telephoned Mr. DeJong and advised him that he was an employee of the respondent. Mr. Richardson testified that at the time he also advised Mr. DeJong that Mr. Coons had given him his business card. At first Mr. DeJong denied that Mr. Richardson had explained to him how he had gotten his name and telephone number, although later he agreed that it was possible that Mr. Richardson had in fact mentioned that

he had gotten his name and telephone number from Mr. Coons. During the course of this telephone conversation it was arranged that Mr. DeJong would attend at a meeting with all five of the respondent's employees at Mr. Richardson's home in Welland on the evening of Monday, October 17, 1977.

13 After making the arrangements for the meeting with Mr. DeJong, Mr. Richardson asked Mr. Coons for his assistance in informing the other employees of the meeting. Mr. Coons testified that he told three of the employees that Mr. Richardson had asked him to tell them of the meeting. When Mr. Richardson is included, this means that four of the five employees of the respondent were spoken to by Mr. Coons concerning the meeting with Mr. DeJong.

14 All five of the respondent's employees attended the meeting with Mr. DeJong on the evening of October 17, 1977. The meeting lasted for about two and a half hours, at the end of which time all five employees signed both applications for membership in CLAC and also declarations that they had made the applications "without coercion, intimidation, threats, pressures or undue influence on the part of anyone". Mr. DeJong testified that at some point during the meeting he mentioned that he had already met with Mr. Coons. He indicated that he could not be certain as to the timing of this statement, but he thought that it had been made after the employees had signed the membership applications but prior to their signing the declarations referred to above. On the following day CLAC filed its application for certification.

15 At this point events took a somewhat dramatic turn. On either the evening on which the employees met with Mr. DeJong, or on the following evening, Mr. Bulanda from Local 537 of the Sheet Metal Workers Union telephoned Mr. Coons. Mr. Bulanda indicated to Mr. Coons that while his union was interested in representing the respondent's shop, it was not interested in taking the respondent's employees into membership. It was suggested to Mr. Coons that he discharge his current employees and henceforth obtain whatever labour he needed from the Sheet Metal Workers Union. The next day Mr. Coons informed Mr. Richardson of this conversation, to which Mr. Richardson replied that it did not matter since the men had already signed membership applications for CLAC.

16 The Board, which at that point had no knowledge of the events referred to above, issued a certificate to CLAC on October 31, 1977.

17 On or shortly prior to November 2, 1977 Mr. Bulanda went to see Mr. Coons and advised him that the Sheet Metal Workers Union was now willing to take the respondent's employees into membership. Mr. Bulanda also indicated that he would like to meet with the respondent's employees on November 3rd at a restaurant in Thorold. This information was passed along to Mr. Richardson by Mr. Coons, and as a result Mr. Richardson and two other employees met with Mr. Bulanda. Following a half hour conversation with Mr. Bulanda, Mr. Richardson and one of the other employees signed applications for membership in the Sheet Metal Workers Union.

18 The respondent in fact obtained the sub-contract at the General Motors plant, and on or about November 10, 1977 the respondent's employees began working at the site. Shortly prior to this date Mr. Bulanda had advised Mr. Coons that if the respondent's employees went onto the job site the Sheet Metal Workers Union would put up a picket line

around the site. No picket line was actually set up, although a few days after the respondent's employees began working at the site the general contractor on the job called a meeting of Mr. Coons, Mr. Bulanda and Mr. Fletcher "to get things straightened out". During the course of this meeting Mr. Coons volunteered that his preference was now to have the respondent's employees represented by the Sheet Metal Workers Union. Some discussion occurred at the meeting as to how CLAC's certificate might be avoided. One of the proposals put forward by Mr. Fletcher was to have Mr. Coons incorporate a second company under a different name and have this company sign a collective agreement with the Sheet Metal Workers Union.

19. On a date which appears to have been shortly after the meeting called by the general contractor, Mr. Coons passed on a message to Mr. Richardson that Mr. Bulanda would like to talk to him. Mr. Richardson then telephoned Mr. Bulanda and made arrangements for him to meet with both Mr. Bulanda and Mr. Fletcher at the Hamilton office of Local 537 of the Sheet Metal Workers Union. At this meeting Mr. Fletcher arranged for Mr. Richardson to meet with counsel for the Sheet Metal Workers Union. Following this meeting the request to have the Board reconsider its decision to certify CLAC was made by Mr. Richardson through the same counsel.

20. Counsel for Mr. Richardson, in support of the request for reconsideration, relied primarily upon section 12 of the Act which states as follows:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin".

21. It was contended by counsel for CLAC that even if it could be assumed that the respondent had acted improperly by becoming involved in the "selection" of a trade union by its employees, this type of action, while perhaps constituting a violation of section 56 of the Act, did not relate to the formation of a trade union and thus was not encompassed by the wording of section 12. We are unable to agree with this submission. The action of an employer in assisting a trade union to organize its employees amounts, in our view, to the contribution of support to the trade union and as such comes within the category of "other support" referred to in section 12. In this regard see *Huron Steel Fabricators* [1964] OLRB Rep. Dec. 458 and *Microdent Laboratories Ltd.* [1969] OLRB Rep. Oct. 852.

22. It was contended by both counsel for CLAC and counsel for the respondent that any employer support of CLAC had been known all along to Mr. Richardson, and that it had been incumbent upon him to raise the matters he now complains of in timely fashion prior to the issuance of the certificate. The Board's general practice is, in fact, not to reconsider a decision or to entertain new evidence unless a party proposes to adduce evidence which it could not previously have obtained by the exercise of reasonable diligence. However, having regard to the strict prohibition contained in section 12 of the Act against certifying trade unions which have received employer support, and to the particular circumstances of this case – including the fact that Mr. Richardson was an employee acting at the relevant time at the behest of his employer – the Board is satisfied that it should exercise its discretion and reconsider its decision to certify CLAC.

23. We are satisfied on the evidence that the respondent did assist CLAC in obtaining its membership evidence. It was Mr. Coons, the sole shareholder of the respondent, who proposed to Mr. Richardson that he meet with Mr. DeJong and who supplied him with Mr. DeJong's business card. Mr. Coons also advised three of the four remaining employees of the time and place of the meeting at which Mr. DeJong signed them into membership.

24. One of the dangers of this type of employer support is that employees may join a trade union not because they personally desire to be represented by that union, but rather because they are under the impression that their employer wishes them to do so. As the Board noted in the following excerpt from the leading *Pigott Motors (1961) Ltd.* case 63 CLLC ¶16,264, employees are particularly vulnerable to employer influence:

"There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act."

In assessing the influence which an employer can have on an employee one need look no further than Mr. Richardson himself. When Mr. Coons indicated that he was favourable to having CLAC represent his employees, Mr. Richardson undertook to assist CLAC in this regard. Later, however, when Mr. Coons adopted a favourable stance with respect to the Sheet Metal Workers Union, Mr. Richardson aligned himself with that union.

25. Having regard to our conclusion that the respondent contributed support to CLAC by assisting it in organizing the employees in the bargaining unit, we are satisfied that pursuant to section 12 of the Act the Board was precluded from certifying CLAC as the bargaining agent of the employees of the respondent. In these circumstances the Board is of the view that it should revoke its decision of October 31, 1977.

26. The actions of Mr. Coons in deciding that the respondent would be better off if its employees were organized and then in working to ensure this result were clearly improper. However, neither CLAC nor the Sheet Metal Workers Union can escape censure for their actions in the events set out above. Mr. DeJong, CLAC's representative, was well aware when he met with Mr. Coons that Mr. Coons was interested in having CLAC represent the respondent's employees. Further, despite going through a routine of warning Mr. Coons about the requirement that employers not interfere in union organizing campaigns, Mr. DeJong sought through a discussion of the history and philosophy of CLAC and through some promotional literature to gain for CLAC the support of Mr. Coons. Having won Mr. Coons support CLAC was then quite prepared to take advantage of this support and to work through the employee directed by Mr. Coons to meet with the union. The Sheet Metal Workers Union also sought to obtain bargaining rights. Here again, however, the union did not seek to obtain such bargaining rights by securing the support of the employees free from

any employer involvement, but rather it sought to work through Mr. Coons. When this did not produce the required results the union then sought to work through the general contractor on the work site to gain its objectives.

27. In this case the respondent employer was quite prepared to cooperate with CLAC to get its employees organized, and any regrets it has for having done so appear to be based on a conclusion that the respondent might have been better off had it backed the other union. Both trade unions sought to obtain bargaining rights for the respondent's employees, but both sought to gain them through employer assistance. It is clear to the Board that the respondent employer and the two trade unions in the pursuit of their own self-interests ignored one of the basic principles underlying The Labour Relations Act, namely that it is open to employees, without employer interference, to select a trade union of their own choice to represent their interests in collective bargaining. That is the principle which section 12 seeks to maintain and protect with respect to the certification process and it is that principle which underlies the Board's decision to revoke its decision to certify CLAC. It would perhaps be in order at this point to also refer to sections 40 and 52 of the Act. Both of these sections are designed to protect the right of employees to be represented by a union of their choice in those circumstances where an employer and a trade union would seek to improperly enter into a voluntary recognition agreement.

28. Pursuant to the provisions of section 95(1) of the Act, the Board hereby revokes its decision of October 31, 1977 in this matter. The Christian Labour Association of Canada is directed to return to the Board the certificate issued to it.

0277-77-R United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant), v. **D. L. Stephens Contracting Niagara Limited and Stephens & Bass Limited**, (Respondents), v. Christian Labour Association of Canada, (Intervener).

Related Employer – Associated companies under common direction in existence for many years and organized by separate unions – Board declined to make related employer declaration.

BEFORE: Arthur L. Haladner, Vice-Chairman, and Board Members F. W. Murray and H. Simon.

APPEARANCES: *Stanley Simpson and P. Hanshar for the applicant; W. McNaughton and D. L. Stephens for the respondents; W. R. Herridge and Fred Heerema for the intervener.*

DECISION OF THE BOARD: June 30, 1978

1. This is an application under section 1(4) of The Labour Relations Act. The applicant trade union is seeking a declaration that the two corporate respondents (Stephens & Bass and Stephens Niagara) be treated as constituting one employer for purposes of the Labour Relations Act and that Stephens Niagara be required to abide by the collective agreement which the applicant alleges existed between itself and Stephens & Bass.

2. Section 1(4) provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. There is no doubt on the evidence that Stephens & Bass and Stephens Niagara are carrying on associated or related activities or businesses under common control or direction within the meaning of the section. The issue is whether the Board should exercise its discretion and treat the two companies as one employer for purposes of the Act.

4. As the Board's jurisprudence makes clear, it is desirable that section 1(4) be applied when the situation is fresh, and not after bargaining rights have been acquired by another trade union. It is clear, moreover, that the use made of the Board's discretionary power is not to be sought as a substitute for obtaining bargaining rights under normal certification procedures, particularly by an applicant which has failed in previous certification proceedings.

5. The evidence in the instant case is that the respondents have carried on separate businesses in the construction industry since 1967. In June of 1975, the applicant, which at that time held bargaining rights for carpenters in the employ of Stephens & Bass applied to the Board to be certified for a unit of carpenters employed by Stephens Niagara. In July of 1975, while the application was before the Board, the applicant entered into separate contractual agreements with Stephens & Bass and Stephens Niagara. Whatever the interpretation to be placed on these "letters of intent", neither of which can be considered a "collective agreement", the Board agrees with counsel for the intervener that they manifest a clear intention on the part of the respondents to continue Stephens & Bass and Stephens Niagara as separate entities for purposes of labour relations and a recognition of this situation by the applicant. Under the terms of the letter of intent between the applicant and Stephens Niagara, Stephens Niagara agreed to use Stephens & Bass to perform some but not all of its carpentry work. For its part, the applicant agreed to withdraw its application for certification.

6. Whether the applicant's agreement to withdraw its application for certification in respect of Stephens Niagara was the result of a failure to obtain sufficient support among the employees of that company to be certified by the Board, as argued by counsel for the respondents, or whether it was the result of a belief that the signing of the letters of intent would preserve forever its jurisdiction as it then existed, as argued by counsel for the applicant, the facts are that the applicant had an opportunity to obtain bargaining rights for Stephens Niagara – either by proceeding with its application for certification or by filing an application under section 1(4) – and chose instead to define its relationship with the two companies by means of private agreements. The end result of that decision, which resulted initially in the applicant's application for certification being dismissed by the Board, was

that bargaining rights which might have been obtained by the applicant were acquired by the intervener; and it is these bargaining rights which the applicant is now seeking to have the Board disturb.

7. The Board is unable on the evidence to conclude that the intervener did anything improper; it should be stressed that it was not a party to either of the aforesaid letters of intent. The conclusion to be drawn from the evidence is that the intervener, which has held bargaining rights for employees of Stephens Niagara since 1972, moved, as was its right, into an area where bargaining rights had been left exposed. We would reiterate here the point made by counsel for the intervener – that had the applicant been concerned that the agreement which was signed in October 1976 (whereby Stephens Niagara and the intervener amended their collective agreement to cover carpenters) did not represent the wishes of the carpenters then in the company's employ, it could have applied to the Board under section 52(1) to have that agreement set aside. Having failed to avail itself of that procedure, the applicant can hardly expect the Board at this late juncture to ignore the existence of the intervener's bargaining rights.

8. In the circumstances, the Board declines to exercise its discretion to treat Stephens & Bass and Stephens Niagara as one employer for purposes of the Labour Relations Act. To do otherwise would be to countenance a delay in seeking relief which was at the very least ill-advised and to fragment an existing bargaining unit.

1880-76-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. Dufferin Aggregates A Division of Dufferin Materials & Construction Ltd., (Respondent).

Certification – Buildup – Representation Vote – Application involving fluctuating work force composed of owner drivers – Board deferred vote to a time when representative group would be employed.

BEFORE: M. G. Picher, Vice-Chairman and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: E. G. Posen, Jovan Ljubicic, and C. Panucci for the applicant; W. S. Cook, F. J. Dewitt and B. G. Carpenter for the respondent.

DECISION OF THE BOARD; June 5, 1978

1. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

2. The application relates to a bargaining unit of owner-drivers of trucks engaged in hauling aggregate materials from the respondent's quarry at Milton. By its decision dated March 13, 1978 the Board determined that the owner-drivers in question were dependent contractors, within the meaning of section 1(1)(ga) of the Labour Relations Act. The Board

has now heard the submissions of the parties as to the application of the Board's policy respecting a build-up of the respondent's work force in the instant case.

3. Some confusion has arisen as to the scope of the Board's earlier determination. For the purposes of clarity the Board emphasizes that its determination is based upon the examination of twelve owner-drivers, all of whom had a regular and long standing relationship with the respondent, all of whom were part of a seniority system established for taking the first load each morning, and all of whom were represented by a drivers' negotiating committee in their relations with the respondent. The Board is not in a position to make any determination as to the status of owner-drivers who might fall outside the scope of facts found in the examinations. The Board's decision as to the status of the owner-drivers, therefore, applies only to those owner-drivers who are part of the seniority list which was filed with the Board by the applicant without objection by the respondent at the hearing on June 1, 1978.

4. The Board finds that all employees engaged as drivers working at or out of the respondent's quarry at Milton, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by virtue of any subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The application of the Board's 30 day rule results in a list of 25 employees for the purposes of this application. Given that the application was filed in February, at a time of year when the respondent's trucking force is substantially depleted and that some 47 employees appear to be regularly employed during the respondent's busy season from May to December, the Board is not satisfied that there was a substantial and representative number of persons employed on the date of application.

6. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent and not more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 23, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Having regard for the evidence of Mr. B. G. Carpenter that there are between forty and fifty employees now regularly at work, the Board is satisfied that a representation vote should be taken at the present time.

8. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

10. Should any persons whose names do not appear on the "Driver's List", filed by the applicant as "Exhibit 3" in these proceedings, present themselves at the polling station,

they shall be permitted to vote and their ballots shall be segregated and not counted pending a further direction from the Board.

11. The matter is referred to the Registrar.
-

1827-77-R, 1828-77-R Labourers' International Union of North America, Local 506, (Applicant), v. **Ellwall and Sons Construction Limited**, A. & M. Ellis Limited, (Respondents), and The Toronto Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local 2; The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicants), v. **Ellwall and Sons Construction Limited**, A. & M. Ellis Limited, (Respondents), v. The General Contractors Section of the Toronto Construction Association, (Intervener).

Related Employer – Employer operating parallel business for some years – No attempt by union to organize employees – No dispute concerning common ownership and control – Board declining to exercise discretion to make declaration.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *S.B.D. Wahl, J. Robbins, D. Johnson and A. Neil for the applicants; Robin B. Cumine and E.A. Ellis for the respondents; E.A. Burrows and J. Trim for the intervener.*

DECISION OF THE BOARD; June 14, 1978

1. These proceedings are hereby consolidated pursuant to the Board's Rules of Procedure.

2. Labourers' International Union of North America, Local 506, ("Labourers 506"), the applicant in File No. 1827-77-R, claims that by virtue of an accreditation order of the Board dated February 18, 1975, the respondent Ellwall and Sons Construction Limited ("Ellwall") is bound by a collective agreement between Labourers 506 and the General Contractors section of the Toronto Construction Association, ("the T.C.A.").

3. The three applicants in File No. 1828-77-R contend that by virtue of a "working agreement" entered into on May 6, 1964 between Ellwall and the Building and Construction Trades Council of Toronto and Vicinity ("The Building Trades Council"), Ellwall is bound by the terms of a collective agreement between the T.C.A. and the International Union of Bricklayers and Allied Craftsmen, Local 2.

4. The position of all of the applicants is that there has been a sale of a business from Ellwall to A. & M. Ellis Limited ("Ellis") and that pursuant to the provisions of section 55 of The Labour Relations Act the aforementioned collective agreements are binding upon Ellis. In the alternative, the applicants contend that Ellwall and Ellis are carrying on associated or related activities or businesses under common control and direction and that the Board should treat them as one employer pursuant to the provisions of section 1(4) of the Act.

5. There is nothing in the evidence which is at all indicative of a "sale" of a business from Ellwall to Ellis, even within the wide definition of that term set out in section 55(1)(a). Thus these proceedings turn solely upon the question of whether the Board should treat the two firms as constituting one employer for the purposes of the Act. Section 1(4) provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions, concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purpose of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

6. Although separate legal entities both Ellwall and Ellis are primarily owned, and effectively controlled, by the same person, namely Mr. E.A. Ellis. Both companies are engaged as general contractors in the construction industry and both operate out of the same offices in the Thornhill district of the Town of Markham. On the facts before it the Board is satisfied that Ellwall and Ellis are corporations carrying on associated or related activities or businesses under common direction or control. Thus the statutory preconditions for the application of section 1(4) have been met. The Board's authority to treat two corporations as constituting one employer, however, is discretionary, and the Board decides whether or not to exercise this discretion on the basis of the particular facts before it.

See: *H. Allaire and Sons Company Limited* [1974] OLRB Rep. July 457.

7. Ellwall was incorporated on June 13, 1963. Since that time it has been engaged primarily in constructing and renovating small industrial and commercial buildings. Since May of 1964 the company has regarded itself as a unionized firm, and generally it competes against other unionized firms. In the year ending June 30, 1977 the company did some \$226,000 worth of work. Since June of 1977 the amount of work performed by Ellwall has dropped off dramatically, although the evidence establishes that the company has continued to bid on jobs but without success. Mr. Ellis testified that three months prior to the hearing additional funds had been put into the company to enable it to bid on larger projects than it has in the past. It is perhaps worth noting that the financial statements of the company which were filed in evidence indicate that the dollar value of the work performed by the company varies considerably year to year.

8. Ellis was incorporated on October 8, 1974. Mr. Ellis in his testimony indicated that the purpose behind establishing the company was to be competitive on smaller projects

where the competition consisted of nonunionized firms. Much of the company's work involves fairly minor renovations to industrial and commercial buildings, although it also undertakes residential work, including projects as small as the renovation of basements in homes. In the year ending June 30, 1977 the company did some \$312,000 worth of business. This revenue, however, appears to have been derived from some 52 different jobs. Mr. Ellis testified that the Ellis company is now also experiencing some difficulty in obtaining work. He indicated that the company obtains only one out of every twenty or thirty jobs it makes a quotation on.

9. Mr. Ellis retains direct control of the activities of Ellwall. With respect to Ellis, however, much of the work, including the costing of jobs and the preparation of bids, is in the hands of an employee of the firm, Mr. George Wong.

10. Ellis does not own any major pieces of construction equipment, although Ellwall does. When Ellis requires the use of equipment it leases it at commercial rates from Ellwall. There appears to be no transferring of employees between the two companies, although "years ago" two supervisors who had been working for Ellwall switched over to Ellis.

11. Prior to the commencement of these proceedings none of the applicant unions claimed bargaining rights with respect to the employees of Ellis, even though the company had been in operation since October of 1974. It is interesting to note that Mr. D. Johnson, who is the business representative of the Building Trades Council, testified that on nine separate occasions since March of 1977 the Building Trades Council upon learning that Ellis had expressed some interest in a job had written to the prospective client to inform it that Ellis was not in contractual relationship with the Building Trades Council. The most recent of these letters was sent only two days prior to the hearing to the Newmarket Library Board when it came to the Council's attention that Ellis had picked up some plans for a job. Mr. Johnson indicated that he had never tried to sign Ellis up to an agreement with the Council since it had never been a successful bidder at public tender.

12. Since October of 1974 Ellwall and Ellis have carried on parallel businesses in the construction industry, Ellwall as a unionized firm working on larger projects and Ellis as a non-union firm on a wide range of smaller projects. It may well be that had the applicants requested relief under section 1(4) at or within a reasonable period after Ellis' entry into the construction industry in 1974 the Board might have been willing to treat the two firms as constituting one employer.

As it is, however, Ellis has for some years been carrying on business as an unorganized contractor employing an unorganized work force. Whether this situation developed because the applicants were unaware of the common ownership and control of the two companies or whether they were aware of it but were willing to accept the situation is not at all clear. What is clear, however, is that the applicants for the first time are now claiming bargaining rights with respect to employees which they have never heretofore even expressed any interest in representing. It appears to the Board that the applicants are in fact seeking to utilize the provisions of section 1(4) as a means of obtaining bargaining rights for the employees of Ellis rather than utilizing the normal certification procedures set forth in the Act. It is our view that the Board should not exercise its discretionary power under section 1(4) to allow this to occur. See: *Inducon Construction of Canada Limited* [1975] OLRB Rep. April 400. If the applicants desire to represent the employees of Ellis they are free to seek to organize them, although it is possible that the employees may desire to remain unrepresented, or,

perhaps, even to be represented by a different trade union, as occurred in the *Zaph Construction Ltd.* case [1976] OLRB Rep. November 741.

13. Having regard to the foregoing reasons, the Board, in the exercise of its discretion, declines to treat the two respondents as constituting one employer for the purposes of the Act.

1960-77-M Eric Gladish, (Complainant), v. ESB Canada Limited and J. Alexander McDonald, (Respondents).

Financial Statements – Whether union member entitled to financial information concerning employer run pension plan – Required form of disclosure restricted to funds administered by trade union exclusively or jointly with employer.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *S. T. Goudge, Eric Gladish and Herman Bock for the applicant; R. N. Gilmore, B. W. Burkett, J. A. McDonald and A. Bathurst for the respondents.*

DECISION OF THE BOARD: June 29, 1978

1. The names: “ESB Canada Ltd.” and “Alick McDonald” appearing in the style of cause of this application as the names of the respondents are amended to read: “ESB Canada Limited” and “J. Alexander McDonald”.

2. Mr. Eric Gladish has complained to the Labour Relations Board that the respondents have failed to furnish him with a copy of an audited financial statement as required by subsection 3 of section 76a of The Labour Relations Act. Section 76a was added to the Act with the 1975 amendments and reads as follows:

76a.-(1) In this section, “administrator” means any trade union, trustee or person responsible for the control, management or disposition of moneys received or contributed to a vacation pay fund or a welfare benefit or pension plan or fund for the members of a trade union or their survivors or beneficiaries.

(2) Every administrator shall file annually with the Minister not later than the 1st day of June in each year or at such other time or times as the Minister may direct, a copy of the audited financial statement certified by a person licensed under *The Public Accountancy Act* or a firm whose partners are licensed under that Act of a vacation pay fund, or a welfare benefit or pension plan or fund setting out its financial condition for the preceding fiscal year and disclosing,

(a) a description of the coverage provided by the fund or plan;

- (b) the amount contributed by each employer;
- (c) the amounts contributed by the members and the trade union, if any;
- (d) a statement of the assets, specifying the total amount of each type of asset;
- (e) a statement of liabilities, receipts and disbursements;
- (f) a statement of salaries, fees and commissions charged to the fund or plan, to whom paid, in what amount and for what purposes; and
- (g) such further information as the Minister may require.

(3) The administrator, upon the request in writing of any member of the trade union whose employer has made payments or contributions into the fund or plan, shall furnish to the member without charge a copy of the audited financial statement required to be filed by subsection 2.

(4) Where an administrator has failed to comply with subsection 2 or 3, upon a certificate of failure so to comply signed by the Minister or upon complaint by the member, the Board may direct the administrator to comply within such time as the Board may determine.

Where this section applies a member of a trade union may require the administrator of his benefit fund to provide him with a copy of an audited financial statement disclosing the information set out in subsection 2.

3. The disagreement of the parties centres on the scope of the duty of disclosure contained in section 76a. Counsel for the complainant contends that the requirement to furnish a financial statement extends to all benefit plans itemized in subsection 1 whether or not they are administered solely by a union, jointly by a union and an employer, or solely by an employer. In the instant case the pension fund is within the sole responsibility of the employer. Counsel for the employer contends that the duty of disclosure in section 76a extends only to those benefit funds which are either controlled solely by a union or jointly by a union and an employer and would not therefore extend to the pension fund in this case because it is administered solely by the employer.

4. The language of 76a(1) is ambiguous and does not on its face establish whether the duty of disclosure should extend to a pension plan administered solely by the employer for the benefit of all employees. It is not immediately clear for example whether "person" in section 76a(a) used in a sequence of categories defining "administrator" includes an employer. As well, the description of the funds in section 76a(1) is sufficiently broad that it is not clear whether "vacation pay fund or a welfare benefit or pension plan or fund for the members of a trade union", encompasses funds administered for employees whether or not they are members of a trade union or whether it extends only to those funds which are ad-

ministered, at least in part, for members of a trade union. Because the wording in section 76a(1) could reasonably support various interpretations, the Board must look to the interpretation which is most consistent with the full context of the section and the Act as a whole.

5. Section 76a(1) is within that portion of the Act headed "Information" extending from section 74 to section 78. We note that in most of these sections the duty of disclosure is one that is cast on the collective for the benefit of individuals. For example, the duty in section 75 to file with the Board a copy of the constitution, by-laws and officers is cast on trade unions, councils of trade unions and employer organizations and clearly does not extend to a single employer. Section 76 is a duty cast upon a trade union to provide to its members an audited financial statement of its affairs. As well, in section 77 the duty to file with the Board the name of a person who is authorized to accept service from the Board is placed upon a trade union and an unincorporated employers' association and, once again, does not extend to a single employer. Viewing section 76a(1) in this light would tend to suggest that the duty of disclosure in section 76a would not include funds administered solely by an employer.

6. Subsection 3 of section 76a grants the right to demand an audited financial statement from the administrator to, and solely to, any member of the trade union. If the Board were to accept the position of the complainant in this case two anomalies would result. Firstly, where the fund is administered by the employer for the benefit of employees, whether or not they are members of a trade union, then trade union members would have greater rights than non-trade union members in that only members could require the administrator to produce a financial statement. This discrepancy is a strong indication that the intention of the Legislature was to exclude from the coverage of section 76a a fund which is administered solely by an employer. While in this case the facts indicate that all the employees are in fact members of a trade union, the Board cannot interpret the section in disregard of the very common situation where a bargaining unit consists of members and non-members.

7. Another anomaly of equal concern that would result if section 76a were to extend to employer administered funds is that it would create a situation where a member of a trade union would have a greater right than the trade union itself to require the disclosure of information. The trade union would be unable to obtain the information directly on behalf of its members. If the intention of the Legislature had been to require disclosure for employer administered funds, it would, in the Board's view, have cast the right to obtain such information upon the trade union as well as a member of the trade union. The exclusion of the trade union strongly suggests that the Legislature assumed that the trade union itself would be involved in the administration of any funds subject to the section 76a duty of disclosure.

8. Another concern that would arise if the section were interpreted as extending to any employer run fund is that there is nothing in the section that would limit the duty to employers who have a collective bargaining relationship with trade unions. In other words, if the funds referred to in section 76a(1) mean any vacation pay fund whether or not the individuals are members of a trade union, then there appears to be nothing that would prevent an employee, simply because he is a member of a trade union, and not necessarily a trade union that has entered a collective bargaining relationship with the employer, from re-

quiring that employer to furnish the statement. Having regard to the intention of The Labour Relations Act which is to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions, it is unlikely that the Legislature would have intended section 76a to have such a broad scope. While the duty to disclose is of general social benefit given the advantageous effect it often has on the proper administration of funds, the Board is unable to extend this duty beyond the reasonable confines of the Act and the most reasonable interpretation of the intention of the Legislature as derived from the context in which the duty appears within the Act. We note that the Legislature has addressed its mind to a more general duty of disclosure cast on administrators of pension funds in *The Pension Benefits Act*, R.S.O. 1970, c.342, as amended, wherein certain obligations are cast upon the employer for the benefit of his employees.

9. Having regard, therefore, to the general thrust of the information section, the scope of the Act and the inconsistencies that would result regarding who would and who would not have the right to require the disclosure if the Board were to accept the complainant's interpretation, the Board finds itself compelled to conclude that the duty of disclosure in section 76a extends to those funds which are either administered solely by a trade union or jointly by a trade union and an employer and not to those funds, such as the fund in this case, which are administered solely by the employer.

10. Accordingly, the Board finds that the respondents in this case have not violated subsection 3 of section 76a of the Act and declines to make an Order under subsection 4. The application, therefore, is hereby dismissed.

1776-77-R Hotel & Restaurant Employees Union, Local 756, St. Catharines, Ontario, (Applicant), and **The Explorer Inns, Limited**, (Respondent), Group of Employees, (Objectors),

Certification – Membership Evidence – Practice and Procedure – Union submitting cards in name of local and international – Board refusing to allow evidence to vary or amend cards to show that all were intended to be in the name of the local.

BEFORE: M. G. Picher, Vice-Chairman and Board Members W. Gibson and O. Hodges.

APPEARANCES: Douglas J. Wray, Charlie Ireton, A.J. Sandy Potter and Steve Connor for the applicant; C. E. Humphrey, M. Lypka and T. Davies for the respondent; Georgena Otterman and Mary Lou Stark for the objectors.

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER W. GIBSON; June 9, 1978

1. The name: "The Explorer Inn, Jarvis, Ontario" appearing in the style of cause of this application as the name of the respondent is amended to read: "The Explorer Inns, Limited".

2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the Explorer Inn (Jarvis) save and except persons above the rank of Manager, Manager, Assistant Managers, Supervisors and Assistant Supervisors, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. There are 60 employees appearing on the lists filed by the employer as included in the bargaining unit on the date of application. When the Board's "30 day rule" is applied to those employees who were not at work on that date the count of employees for the purposes of this application is reduced to 58.
6. A total of 34 membership documents were filed by the applicant. One is a "lost card" as it bears a name which does not appear among the list of employees. A second card is excluded by virtue of the application of the Board's "30 day rule". That reduces the count to 32 out of 58, the minimum number which would normally entitle the applicant to outright certification, subject of course to the Board's determination on any evidence that might be adduced by the group of employees who have filed a numerically relevant petition in objection to this application.
7. There is, however, a further reduction in the strength of the applicant's membership evidence. One of the membership applications submitted does not contain the notation "Local 756" in the blank space provided for that purpose upon it. In other words on its face it demonstrates an intention to apply for and accept membership in the Hotel and Restaurant Employees' and Bartenders' International Union, and not Local 756 of that union, the applicant in these proceedings.
8. While membership in a local is deemed for the purposes of an application for certification to be membership in a parent international where the parent is the applicant, it is the well established practice of this Board that the signing of a membership application in an international union is not evidence of an employee's membership in a particular local of that international union (*Cochrane Dunlop Hardware Ltd.* 63 CLLC ¶16,268; *O. J. Gaffney Ltd.* [1965] OLRB Rep. Dec. 641; *The Journal Publishing Company of Ottawa* [1974] OLRB Rep. July 499; *Bernardin of Canada Ltd.* [1975] OLRB Rep. October 737; *Beatrice Foods (Ontario) Limited, Lakeview Dairy Division* [1977] OLRB Rep. March 192.).
9. The applicant sought leave to adduce *viva voce* evidence to supplement its documentary evidence in this regard. However, where it is submitted by an applicant that the failure to show the local on the application document was merely a clerical oversight, the Board does not permit *viva voce* evidence to vary or amend the deficient evidence filed (see *Bernardin* and *Beatrice Foods* (*supra*). The extent of *viva voce* evidence permissible in these circumstances is described in section 48(2) of the Board's Rules of Procedure which provides that such oral evidence is admissible only to "identify and substantiate" the written evidence which must be filed in support of an application. The Board has held that the opportunity to identify and substantiate documentary evidence does not give latitude to substantially add to, amend or contradict documentary evidence that is deficient on its face. (*Bernardin supra*).

10. If that approach appears to be unduly harsh or technical, it must be borne in mind that it is adhered to by the Board to preserve the integrity of the certification process for the benefit of both employees and their trade unions. Certainty, expedition and confidentiality are fundamental to the success of that process. The strict requirements attaching to the quality of documentary membership evidence filed and to the mandatory declaration concerning those documents (Form 8) executed by a union officer with material knowledge of the documents are vital if the Board is to rely on documents that are hearsay in nature and not subject to scrutiny or cross examination by the respondent employer. To permit the shoring up of deficient documentary evidence by *viva voce* evidence subject to full cross examination would undermine the confidentiality of that evidence, cause the potential for adjournments and undue delay of the certification process and reduce the established need for care and accuracy in the gathering and filing of that evidence. In short, it would undermine the integrity of the process to the detriment, in the long run, of the very parties whose interest it is meant to serve.

11. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on March 1, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. In these circumstances it becomes unnecessary for the Board to inquire into the circumstances surrounding the origination and circulation of the petition filed by the group of employees.

12. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. The matter is referred to the Registrar.

15. Board Member, O. Hodges dissents with reasons to follow.

0213-78-R Calvin W. Golbeck, (Applicant), v. Sheet Metal Workers' International Association, Local Union 562, (Respondent).

Termination – Practice and Procedure – Whether following dismissal of earlier application a new application should be entertained.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *W. G. Winsor, Calvin Golbeck and Michael Dietrich for the applicant; Thomas Kuttner and Cliff Coffin for the respondent.*

DECISION OF THE BOARD:

1. The name: "Sheet Metal Workers International Association Local Union 562" appearing in the style of cause of this application as the name of the respondent is amended to read: "Sheet Metal Workers' International Association, Local Union 562".
2. The applicant has applied to the Labour Relations Board under section 49 of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
3. Counsel for the respondent objected to the timeliness of this application. Counsel agrees that the application has been filed within the open period and that the appointment of the conciliation officer does not itself bar the application since it was filed prior to the termination of the collective agreement. Counsel contends however that because this application follows directly upon the dismissal of another application for termination, the Board, following the principle established in *Trinidad Leaseholds (Canada) Ltd.* 52 CLLC ¶17,005, should exercise its discretion and decline to hear the instant application.
4. On April 26, 1978 the Board dismissed an application for termination filed by Michael J. Dietrich (File No. 1996-77-R). At the commencement of that hearing, counsel for Mr. Dietrich requested an adjournment because Mr. Dietrich was on vacation in Holland and unable to give evidence before the Board. The Board denied the adjournment and dismissed the application without hearing evidence because the applicant was not in a position to produce a witness who could give viva voce evidence as to the circumstances surrounding the origination of the statement of desire and the manner in which each of the signatures was obtained. In the circumstances, therefore, the Board did not determine whether or not the petition constituted a voluntary statement of desire or whether it represented the wishes of not less than forty-five per cent of the employees in the bargaining unit. Instead, it dismissed the application prior to hearing the merits because of a lack of the necessary type of evidence.
5. Concerning his misjudgement of the extent of evidence that would be required at the hearing, Mr. Golbeck testified that although he had read Form 15 which states that an employee representative who appears at the hearing will be required to testify or produce witnesses who will be able to testify from their personal knowledge and observation as to the circumstances concerning the origination of the material filed and the manner in which each of the signatures was obtained, he did not realize that Mr. Dietrich's absence from the hearing would be fatal and in fact thought that as long as he attended as a signatory there would be no problem.
6. Both counsel for the applicant and Mr. Golbeck indicated that the Board's oral dismissal of the petition was specifically made without prejudice to the bringing of a new

application for termination. Counsel for the respondent was not present at the original hearing and was therefore unable to comment on this aspect of the Board's ruling. No mention of a subsequent application was made by the Board in its written decision.

7. Mr. Golbeck testified that as soon as the first petition was dismissed by the Board at the hearing on April 17, he started another application for termination which was submitted to the Board on April 28, 1978.

8. In *Trinidad Leaseholds, supra*, the main case the respondent relies on to support its position that the instant application is untimely, the Board declined to hear an application for certification submitted less than two months after the dismissal of another application for certification for the same bargaining unit. The initial application was dismissed by the Board because the union did not have sufficient employee support. In dismissing the second application, the Board stated at page 1355,

The primary objective of the Regulations [Regulations 7(1) and 7(4) of the *Wartime Labour Relations Regulations*, R.S.C. 1944, c. 206] is to promote sound and effective collective bargaining and it must be assumed that the method furnished by the certification provisions of the Regulations for the orderly disposition of representation matters is designed to contribute to the attainment of that objective. Those provisions reflect a realization of the fact that collective bargaining will not flourish nor will a sound collective bargaining relationship endure where a question of representation of employees is outstanding. It is evident, however, that questions of representation are not to be raised indiscriminately and that the determination of such questions is to involve a measure of finality.

The Board then went on to discuss the balance it seeks to strike between the right of employees to choose a new bargaining agent and the necessity for stability and continuity in collective bargaining:

... it would not, in our view, accord with the manifest purpose of that regulation to conclude that once the ten month period has passed any number of applications may then be made, without interval, by the same applicant. On the contrary we are of opinion that where there is a current and active collective bargaining relationship and where an application, properly made under regulation 7(4), is rejected on the ground that the applicant does not enjoy the requisite employee support, a second application by the same applicant should not be entertained by the Board until a reasonable opportunity has been given to the parties to the collective agreement to bargain collectively with a view to its renewal.

9. The principle established in *Trinidad Leaseholds* has been applied consistently by the Board and extended to successive termination applications as well as certification applications. (See for example *Filey-Hall Paper Box Co. Limited* 52 CLLC ¶17,037; *Windsor Lumber Co. Ltd.* 58 CLLC ¶18,104; *Canadian Sealright Co. Ltd.* 59 CLLC ¶18,157; *Wesmak Lumber Co. Limited*, [1961] OLRB Rep. Mar. 447; *Continental Can Company of Canada*,

Limited, [1964] OLRB Rep. Dec. 459; *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791 and *Chapleau Lumber Co. Ltd.*, [1973] OLRB Rep. Nov. 5740.) In the *Seven-Up* case, the Board summarized at p. 804 the principle as it has developed from its original statement in *Trinidad Leaseholds*:

The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, *once a representation issue has been dealt with on its merits and in the absence of special circumstances*, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

(emphasis added)

10. A case involving special circumstances causing the Board to decline to apply the *Trinidad Leaseholds* principle was *Soo Dairies Limited*, [1971] OLRB Rep. July 439. In that case the Board dismissed the application for termination because no one was called by the applicant to testify as to the origination of the petition. The application was dismissed because a mistake, for which counsel for the applicant took full responsibility at the next hearing, had been made relating to the nature of the evidence which should have been adduced by the applicant; it was not dismissed through a finding of either inadequate employee support or involuntariness. A second application for termination was forthwith submitted by the applicants. Although the evidence was clear that the respondent union was actively seeking to bargain for the renewal of the collective agreement and was delayed in its efforts by the two termination applications, it was also clear from the evidence that the applicants were not lax in filing their termination applications. Because the Board was satisfied that the dismissal of the first application was caused by an honest mistake by the applicants concerning their understanding of the nature of the evidence that had to be called and that the application had not been heard on its merits, the Board, in balancing the right of employees to choose their bargaining representative with the desire for stability in an existing collective bargaining relationship, consented to hear the second termination application. (For another case involving special circumstances see *Du Pont of Canada Limited*, [1967] OLRB Rep. 737, where the Board declined to raise a bar because it concluded that the applicant was victimized by a "technical irregularity".)

11. In the circumstances of this case, the Board is also satisfied that special circumstances exist which must cause the Board to decline to apply the *Trinidad Leaseholds* principle. The first application was not heard on its merits but was dismissed due to an innocent failure on the part of the petitioners to understand the nature of the evidence required to support a termination application. The second application was filed without delay and was in no way intended to harass the union. The Board is of the view that in this instance the proper balance between the interests of the employees in testing the right of the union to represent them and the desire for stable collective bargaining is to allow the employees the

opportunity to have their application heard on its merits. Stability cannot prevail if a legitimate question of the union's right to represent the employees remains unresolved. Once a termination application has been heard on its merits and dismissed, the concern is to get on with collective bargaining. In this instance, however, the predominant concern must be to have that preliminary question of the right of the union to represent the employees resolved on its merits.

12. We turn now to the petition itself and a determination of whether or not it represents the voluntary wishes of those who signed it. Mr. Calvin Golbeck, a working foreman employed by S. E. Rozell & Sons Limited, testified on behalf of the petitioners concerning the origination, preparation and circulation of the petition. Mr. Golbeck filed an application for termination in 1977. This application was dismissed by the Board because the Board concluded that it was tainted by managerial involvement. Mr. Golbeck testified that after the dismissal he contacted his MPP to see if he could appeal the dismissal. Apparently, the MPP said that he couldn't, but indicated that he would be able to file another application for termination in March 1978. Mr. Golbeck testified that when the open period came around in the spring of 1978, he and Mr. Dietrich decided to organize another termination application under Mr. Dietrich's name. The fate of Mr. Dietrich's application is set out above.

13. Immediately following the Board's dismissal of the Dietrich application, Mr. Golbeck spoke with his counsel about filing a new application. When he returned home he called the shop foreman, a member of the bargaining unit, to relate what had happened to the Dietrich application. Mr. Golbeck testified that they both agreed at that time to make another application.

14. The evidence shows that later the same afternoon, Mr. Golbeck's employer, Mr. Rozell, called to ask what happened to the Dietrich application. Mr. Golbeck explained why the petition had been dismissed and stated as well that he was going to make another application. Mr. Golbeck testified that he never mentioned his phone conversation with Mr. Rozell to the other petitioners. As well, he testified that although Mr. Rozell had expressed his views concerning the union to him prior to the 1977 application, they had not spoken about the subject in any manner since.

15. With respect to the wording of the petition, Mr. Golbeck stated in examination-in-chief that he had no discussions with management concerning the petition and that he had no help in drafting the petition. In cross-examination he indicated that he had used documents relating to the 1977 petition which had been drawn up with the help of a lawyer as a guide in drafting the instant petition.

16. Counsel for the respondent union asked the Board to dismiss the application because of a lack of credibility on the part of Mr. Golbeck and an inference of employer involvement which he claims should be drawn from both the close proximity of the 1977 petition and the above mentioned phone conversation with Mr. Rozell.

17. The Board did not find Mr. Golbeck to be over-defensive or evasive in his manner of answering questions as was suggested by counsel for the respondent. Instead, the Board thought he was open and straightforward. Although some of his answers caused some confusion in ascertaining the details of his job function, nothing in his evidence

caused the Board to suspect that he was trying to mislead the Board or to cover up essential facts that might reveal managerial involvement. Furthermore, with respect to Mr. Golbeck's evidence concerning the wording of the petition, the Board does not agree with the suggestion of counsel that Mr. Golbeck contradicted himself on cross-examination. Because the tone of the question in examination-in-chief was whether or not he had had any help from management, the Board views the modification of his response in cross-examination as a clarification rather than a contradiction.

18. With respect to the continuing effect, if any, of the 1977 petition, the Board, in the absence of any conversations with the employer on the subject of the union or the petition since the dismissal of the 1977 petition, is unwilling to draw the conclusion that if the employees had been influenced by the employer it would necessarily follow that they were similarly influenced a year later. The Board is of the view that the nature of the employer's involvement in 1977 was not of such an enduring character as to have an inevitable impact on another application filed a year later. Furthermore, in the absence of additional evidence, the Board is satisfied that the fact that the majority of the petitioners in the instant application were the same as those in the 1977 application and the fact that the wording of the preamble was identical has no detrimental impact on the voluntariness of the instant application.

19. Finally, counsel for the respondent argued that the Board should draw an inference of employer involvement from the telephone conversation that took place between Mr. Rozell and Mr. Golbeck immediately following the dismissal of the Dietrich petition. Although the subject of the petition came up in the telephone conversation and Mr. Golbeck told Mr. Rozell that he would be filing the instant application, the Board is satisfied that Mr. Golbeck was completely uninfluenced by the telephone conversation. The Board accepts that he had fully made up his mind to file the application before the telephone call. Mr. Golbeck's conversation with his MPP following the dismissal of the 1977 petition to ascertain what avenues of appeal might be open to him provides further support for the Board's conclusion that the telephone conversation had no effect on the initiation of the application in question. Because Mr. Golbeck did not tell the other petitioners about the phone call, the Board is further satisfied that the call was not an inducement to them in signing the petition.

20. For the reasons set out above, the Board is satisfied that the applicants have discharged their burden of satisfying the Board that the statement of desire filed in support of the application is a voluntary statement of desire.

21. The Board is further satisfied that not less than forty-five per cent of the employees of S. E. Rozell & Sons Limited in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of May 11, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

22. The Board directs that a representation vote be taken of the employees of S. E. Rozell & Sons Limited. Those eligible to vote are all journeymen sheet metal workers and

registered apprentices in the employment of S. E. Rozell & Sons Limited, in the Cities of Kitchener-Waterloo, Guelph and Cambridge, and the Counties of Waterloo, Wellington, Grey and Perth with the exceptions of Blanchard, Downie, Fullerton, Hibert and Logan Townships including all the municipalities contained therein on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

23. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with S. E. Rozell & Sons Limited.

24. The matter is referred to the Registrar.

1569-77-R Barry Polkinghorne, (Applicant), v. Local Union 1687, International Brotherhood of Electrical Workers, (Respondent), v. **M.G. Burke Investments Ltd.**, (Intervener).

Termination – Timeliness – Letter of intention to terminate received by Board in open period – Letter containing all necessary information – Application treated as timely despite failure to use prescribed form.

BEFORE: N.B. Satterfield, Vice-Chairman and Board Members C.G. Bourne and M. Fenwick.

APPEARANCES: Barry Polkinghorne, applicant; C.M. Mitchell and Z. Popovich for the respondent; K.R. Valin and D. McNab for the intervener.

DECISION OF THE BOARD; June 5, 1978

1. This is an application for terminating bargaining rights filed under section 49(2) (a) of the Labour Relations Act.

2. This matter was first put on for hearing January 30, 1978 but was adjourned so that notice of the proceedings could be given to the Sudbury Electrical Contractors Association which appeared to have an interest in them. The matter was continued for hearing on April 20, 1978 and the Association made no appearance. However, the Board added the employer M.G. Burke Investments Ltd., as an intervener in the proceedings.

3. The applicant made his application for termination of bargaining rights by letter dated December 31, 1977 and accompanied it with a petition bearing signatures of two employees. The Registrar in acknowledging receipt of the letter replied in part as follows:

“I point out that applications for termination of bargaining rights must be made on Form 13 of the Board’s forms, a supply of which is enclosed, together with a copy of the Labour Relations Act and the Board’s Rules of Procedure together with a Guide to the Labour Relations Act.”

4. Counsel for the respondent raised three preliminary challenges to the timeliness of the application for termination of bargaining rights. At the hearing, the Board reserved its decision on these issues and proceeded to hear the case on its merits. The case was not concluded at that hearing and it was subsequently scheduled for continuation on June 6, 1978. On May 5, 1978, counsel for the respondent wrote to the Board seeking a decision on the three preliminary issues. The Board has advised the parties that it is dismissing all three challenges and will continue to hear the matter on its merits at the hearing on June 6, 1978. The purpose of this decision is to give the parties the reasons for the Board's decision.

5. The Board finds it useful to review the recent chronology of events affecting the parties to this proceeding. On February 28, 1977 the Board certified the respondent as bargaining agent for a group of employees of the intervener. These parties subsequently commenced to negotiate a collective agreement and on October 17, 1977 they signed two documents which they considered to be a memorandum of settlement by which it is agreed that the employer would be bound by the terms of a collective agreement in force between the Sudbury Electrical Contractors Association and the respondent. This collective agreement became effective January 5, 1976 and bears an expiry date of December 31, 1977. One of the settlement documents stipulates as follows:

“The rate of pay will become effective October 1, 1977, and the International Brotherhood of Electrical Workers Union and any of its members hereby waive all and any rights to file any claim or grievance with respect to wages, pay treatment and Health and Welfare remittances against M.G. Burke Investments Ltd. with respect to this case of any instance prior to October 1, 1977.”

At the time the Board certified the respondent, it also had under consideration an application for accreditation of the Electrical Contractors Association and on June 28, 1977 the Board accredited the Association as bargaining agent for all employers with whom the respondent in these proceedings had bargaining rights. On the date of accreditation, there was already a collective agreement in existence between the Association and the respondent; it is this agreement to which the respondent and intervener consider they were binding themselves by virtue of the documents which they signed on October 17.

6. Of the three issues raised by the respondent, one involves the form in which the application for termination of bargaining rights was made and the other two involve the identification of the governing collective agreement. The three issues may be summarized as follows and there is a degree of interrelationship amongst all of them:

- (a) Counsel for the respondent holds that the application for termination of bargaining rights was made on January 11, 1978 when the applicant filed a Form 13 with the Board, the form in which it is required under section 12 of the Board's Rules of Procedure. Counsel further holds that the letter filed December 31, 1977 is defective in form not correctable under the Board's general powers in section 59 of the Rules of Procedure. Section 59 reads as follows:

“No proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity.”

(b) The two other issues are whether the employer is bound by:

- (i) a collective agreement directly between it and the respondent by virtue of the memorandum of settlement documents signed October 17, 1977 by those parties and which embrace the terms and conditions of the respondent's collective agreement with the Sudbury Electrical Contractors Association; or
 - (ii) by the Association's collective agreement as a result of the accreditation of the Association by the Board on June 28, 1977.
- (c) If the Board finds that the governing collective agreement is the one in paragraph (i) above, it is argued that this would make the application in either form untimely by operation of section 44(1) of the Labour Relations Act. On the other hand, if the Board finds that the collective agreement in paragraph (ii) is the governing one and that the application was made on January 11, 1978, it raises the supplementary issue of whether a conciliation officer had been appointed by the Minister of Labour prior to that date, as was the case argued by respondent's counsel."

7. Dealing firstly with the question of the governing collective agreement, the Board finds that by operation of section 116(4) of the Labour Relations Act, M.G. Burke Investments Ltd. became covered by the agreement referred to in 6(b) not later than June 28, 1977, the date of accreditation of the Association and December 31, 1977 becomes the governing expiry date for considering the application, since section 116(7) of the Act eliminates the obstacle which otherwise would have been imposed by section 44(1). Therefore the challenge on timeliness based on that section fails.

8. Now it is necessary to turn to the issue in item (i) above. The Board finds that the application made in the form of the statement of desire and covering letter each dated December 31, 1977, is acceptable in the circumstances of this case. In so finding, the Board relies on section 59 of the Rules of Procedure and on the fact that these documents contain all of the information required by Form 13 and under section 48(1) of the Rules of Procedure, thus the respondent's interests are not prejudiced by the defect in form. Therefore December 31, 1977 is established as the date of application and it is unnecessary to determine the supplementary issue of the appointment of a conciliation officer.

9. The Board is aware of the risk of creating uncertainty for the parties which appear before it whenever it departs from its Rules of Procedure and, therefore, it does so reluctantly. However, it has likewise been reluctant to dismiss on preliminary motion an application for termination of bargaining rights merely because the form of documents tendered in support thereof may appear to be deficient in form. See for example *Genwood Industries Ltd.* [1976] O.L.R.B. Rep. August 417, in paragraph 7 of which the Board, in considering a preliminary motion for dismissal, said in part:

"It is the duty of this Board to concern itself with the substance and not merely with the form of documents tendered in support of an application for the termination of bargaining rights. It may be that in some

cases the wording of such documents may be so inadequate as to cause this Board to dismiss the application upon a preliminary motion. This is a question that falls to be determined within the particular circumstances of the case."

In paragraph 8 the Board went on to say:

"It is the intention of section 49 that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt the 'forms of action' approach suggested by Mr. Sack. The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act."

While the Board was dealing in that case with a preliminary challenge of the respondent that the petition was not a clear statement of desire that the petitioners no longer wished to be represented by the trade union and not with a defect in the form of the application, its decision is a clear expression of how it views its responsibilities under the Act. For further confirmation see also *Westinghouse Canada Limited* [1977] O.L.R.B. Rep. October 651, wherein the Board deals with problems similar to *Genwood*.

10. In summary, then, the Board, by finding that the governing collective agreement is the one between the Sudbury Electrical Contractors Association and the respondent and that the applicant's letter and the statement of desire dated December 31, 1977, constitute, in the circumstances of this case, an acceptable form for an application for termination of bargaining rights, dismisses all three preliminary challenges to the timeliness of the application.

11. Therefore the Board will continue to hear the merits of the application at the hearing scheduled for June 6, 1978.

1586-77-U Local Union 1788 of the International Brotherhood of Electrical Workers, (Applicant), v. **Ontario Hydro**, (Respondent).

Arbitration – Section 112a – Whether employees entitled to holiday pay for days not worked

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members A. HersHKovitz and R. D. Joyce.

APPEARANCES: *S.B.D. Wahl, H. Scheuler, K. Sloat and S. Smoczynski appearing for the applicant; R. Dunsmore, W. O'Neill and A. Bell appearing for the respondent.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER R. D. JOYCE: June 12, 1978

1. This is a referral of a grievance to the Board pursuant to section 112a of The Labour Relations Act.

2. The parties are signatories to a subsisting collective agreement. At the hearing the parties filed an agreed statement of facts which was supplemented by certain viva voce evidence.

3. The grievance alleges that the respondent has violated article 11 of the collective agreement by failing to pay to its employees covered by the collective agreement "a normal day's pay" for each of Christmas Day 1977 and New Year's Day 1978, and also by failing to pay overtime rates for work alleged to have been performed on Boxing Day 1977.

4. It is uncontested that the respondent did not pay the employees for either Christmas or New Year's Day, both of which fell on a Sunday. The respondent's position is essentially that the collective agreement requires payment for these days only if they are observed on a scheduled day of work, which Sunday is not. The applicant's position is that Christmas Day and New Year's Day were observed on Monday December 26, and Monday, January 2nd. The claim with respect to Boxing Day arises out of the applicant's contention that since Christmas Day was observed on December 26, 1977, Boxing Day must have been observed on Tuesday, December 27, 1977.

5. Although this point was not specifically referred to in the agreed statement of facts, Mr. Scheuler, the applicant's business manager, during cross-examination stated that the respondent's operations were essentially closed down between December, 1977 and January 2, 1978 inclusive.

6. The relevant article in the collective agreement is article 11, which is set out in full below.

Article 11 *STATUTORY HOLIDAYS*

11.1 The Statutory Holidays recognized under this Agreement are:

New Year's Day	Civic Holiday
Good Friday	Labour Day
Easter Monday	Thanksgiving Day
Victoria Day	Christmas Day
Dominion Day	Boxing Day

11.2 The Employer agrees to recognize Heritage Day when proclaimed by legislation.

11.3 All hourly-rated employees who have been employed for three months in the calendar year and who report for work on the working day immediately prior to and following Christmas Day or New Year's Day, unless the reason for absence was sickness or accident or authorized leave of absence, shall receive a normal day's pay for each of these two days they are observed on a scheduled day work and no work is performed.

11.4 If work is performed on a Statutory Holiday that is observed on a scheduled day of work, payment will be made in accordance with the provision contained in the appropriate Appendices to this Agreement.

11.5 The Employer agrees to consider requests from the Union for substitution of another day in lieu of a Statutory Holiday for those employee groups working in areas distant from their homes.

11.6 In the event that a Statutory Holiday is officially observed on an inconvenient day, it may be observed on another day upon mutual agreement.

7. Before proceeding any further, it is worth noting that this matter is not affected by any legislative enactment. As will be noted again later, The Employment Standards Act does set forth certain general requirements with respect to holidays which fall on non-working days. However, section 7(2) of Regulation 803 under the Act provides that the part of the Act which relates to holidays does not apply to employees who work in construction and receive seven per cent or more of their hourly rate for vacation or holiday pay. The employees who work under the collective agreement receive either nine or ten per cent of their hourly rate of pay for vacation pay depending on where in the province they are working.

8. The key provision of the collective agreement is clearly article 11.3. Leaving aside the qualifying requirements for individuals set forth at the commencement of the clause, the clause in its essentials states as follows: "all hourly-rated employees • • • shall receive a normal day's pay for each of these two days if they are observed on a scheduled day of work and no work is performed." (If work is performed, then certain overtime rates set out elsewhere in the agreement become applicable).

9. At the hearing counsel for both parties appeared to treat Monday to Friday inclusive as a "scheduled day of work", even in those instances where the respondent does not in fact require any work to be performed. Such an interpretation of the phrase is a reasonable one in the circumstances and corresponds to the terms of article 16 of the collective agreement which provides that the normal hours of work for employees shall fall on Monday to Friday inclusive. Keeping this interpretation of the phrase "scheduled day of work" in mind, article 11.3 seems to indicate that if Christmas and New Year's Day are "observed" on a week-day Monday to Friday, and no work is performed (so as to call for a higher rate of pay), then employees are entitled to receive a normal day's pay for each of the two days.

10. Reference in article 11.3 to the days on which Christmas Day and New Year's Day are observed, as opposed to the days on which they fall, would appear to be of some

significance. It now seems to be fairly well settled that although a day of particular religious or civic importance might fall on one day, for industrial purposes the holiday aspect of the day, in the sense of a pause from work, might be observed on yet another day. This difference is illustrated in *Re: United Packinghouse Workers, Local 211 & W. Harris & Co. Ltd.* (1956) 7 L.A.C. 13 (Taylor). Further, although there exists authority to the contrary (see: *Re United Steelworkers, Local 2000, and Stamped & Enamelled Ware, Ltd.* (1961) 11 L.A.C. 224 (Fuller), the decision of the arbitration board in *Re: United Electrical Workers, Local 504, and Canadian Westinghouse Co. Ltd.* (1961) 11 L.A.C. 207 (Cross) and the subsequent dismissal of an application by way of certiorari to set aside the award, *Re: Canadian Westinghouse Co. Ltd. and United Electrical, Radio & Machine Workers of America, Local 504* (1961) 30 D.L.R. (2d) 676 (Ont. H. Ct.), are strong authority for the proposition that when a public holiday falls on a Sunday it is generally observed on the following Monday. In this regard see also *Re Sudbury General Workers Union, Local 902, and A. Silverman & Sons Ltd.* (1967) 18 L.A.C. 224 (Weiler).

11. A difficulty in simply assuming in the instant case that any holiday which falls on a Sunday is automatically to be observed on the following Monday for the purposes of the collective agreement is the fact that article 11.6 of the collective agreement addresses itself to the question of when holidays are to be observed. Article 11.6 provides that when a holiday is "officially observed" on an inconvenient day "it may be observed on another day upon mutual agreement".

12. It appears to us that the phrase "officially observed" in article 11.6 relates to the day on which a religious or civil holiday is actually celebrated. For civil holidays, it will be a date set by custom and/or by statute. (See for example, *The Holidays Act* R.S.C. 1970 Ch. 7 s. 4). For religious holidays, it will be the date set for observance by the relevant religious officials. We believe that we can take notice of the fact that Christmas is a festival of the Christian Church which is observed by the relevant religious officials on December 25th and that Boxing Day is by custom observed on the first weekday after December 25th. New Year's Day, in turn, is by law and custom the first day of January of each year. (In this regard reference is made to *Black's Law Dictionary*, 4th ed., which at page 1194 indicates that the 25th of March was the civil and legal New Year's Day until altered to January 1st in 1752). On the basis of these considerations, we are satisfied that for the purposes of the collective agreement Christmas Day was officially observed on December 25, 1977, Boxing Day on December 26, 1977 and New Year's Day on January 1, 1978.

13. The wording of article 11.6 of the collective agreement suggests to us that for the purposes of the collective agreement a holiday will generally be observed on the same day that it is "officially observed", although it may be observed on some other day if the precondition provided for by clause 11.6 has been met, namely the change has been mutually agreed upon by the applicant and the respondent.

14. It is clear that there was no mutual agreement between the applicant and the respondent to observe Christmas or New Years for the purposes of the collective agreement on any days other than the days on which they were officially observed. In April or May 1977 the respondent informed the applicant that it did not intend to pay employees covered by the collective agreement for either Christmas Day or New Year's Day. Mr. Henry Scheuler, the applicant's business agent, testified that in mid-December 1977 he sought to convince the respondent that Christmas Day and New Year's Day should be observed on the

Monday, but that the respondent made it clear to him that it intended to observe both holidays on Sunday.

15. Counsel for the applicant took the position that notwithstanding the respondent's refusal to agree to observe Christmas Day and New Year's Day on the following Mondays, it in fact did observe them on the Mondays. In support of this position counsel relied upon the stipulation contained in the agreed statement of facts that non-construction and approximately 20 per cent of the construction employees of the respondent not covered by the collective agreement "observed" Christmas Day on December 26, Boxing Day on December 27, and New Year's Day on January 2nd.

16. Counsel for the respondent contended that with respect to its non-construction employees the respondent "observed" the three holidays on the days it did because of the requirements of The Employment Standards Act, requirements which do not apply to the employees in the bargaining unit. Section 26(4) of that Act provides that when a public holiday (which is defined so as to include Christmas Day and New Year's Day) falls on a non-working day for an employee, his employer shall designate a working day and that working day "shall be deemed to be the public holiday" or, in the alternative, the employer, with the agreement of the employee or his agent, can simply pay the employee his regular wages for the day. It appears then that the respondent designated December 26 and January 1 as the days to be deemed to be the public holidays for the purposes of The Employment Standards Act with respect to non-construction employees. With respect to the twenty per cent of the respondent's construction employees who also "observed" Christmas and New Year's Day on Monday, there is nothing in the evidence or the agreed statement of facts to indicate whether these employees received at least seven per cent of their hourly rate for vacation or holiday pay and were thus exempt from the requirements of section 26(4) of the Act, or whether the terms of any other differently worded collective agreement were applicable to them. In any event, we are not satisfied that simply because the respondent "observed" Christmas Day and New Year's Day on days other than those on which they were officially observed with respect to certain employees, it necessarily follows that the holidays were also observed on the Mondays for the purposes of the collective agreement. Article 11.6 clearly implies that for the purposes of the collective agreement for a holiday to be observed on a day other than that on which it is officially observed requires mutual agreement, and no such mutual agreement existed in this case.

17. Counsel for the applicant also took the position that past practice could be used as an aid to determining the meaning to be given to article 11 of the collective agreement. The "past practice" relied on is the fact that in the years 1966-67; 1960-61 and 1955-56 when both Christmas Day and New Year's Day fell on a Sunday, Monday December 26 and Monday January 2 were observed and paid for as Christmas Day and New Year's Day respectively. The relevant collective agreements at the time contained a provision similar to article 11.3 of the current agreement. We are unable to accept counsel's submissions in this regard for a number of reasons. Firstly, we are not satisfied that the events being relied on necessarily reveal the intention of the parties when drafting Article 11. The events referred to demonstrate that on three occasions in the past when Christmas and New Year's Day fell on a Sunday they have been observed on the following Monday. As we have already noted, however, the wording of the collective agreement indicates that such might well occur. The question at issue is whether or not it is required that the holiday be observed on the Monday even if the respondent does not agree to such an arrangement. The fact that the respondent

apparently agreed to the arrangement on three previous occasions, does not lead to a conclusion that the same situation of necessity must from then on prevail.

18. Quite apart from relying on past practice as an aid in interpreting the collective agreement, counsel for the applicant contended that because of the respondent's past actions it was now estopped from refusing to observe Christmas and New Year's Day on the Monday. To further support this position counsel relied on the following paragraph in the agreed statement of facts:

"At some time prior to 1973, representatives of the Company represented to the Union Business Agent that the Interpretation Act applied to the question of the dates for observation of Christmas and New Year's Day". The Interpretation Act provides that in interpreting Provincial Statutes, unless the context otherwise requires, " 'holiday' includes ¶ New Year's Day, Christmas Day ¶ and when any holiday, except Remembrance Day, falls on a Sunday, the day next following is in lieu thereof a holiday".

19. We are of the view that the applicant's attempt to invoke the common law doctrine of estoppel cannot succeed. For the doctrine of estoppel to be applicable there must have been conduct or a representation made by one party which caused the other party to change its position or otherwise rely on that conduct or representation to its detriment. See: *Re Edwards of Canada, Unit of General Signal of Canada Ltd. and United Steelworkers, Local 7466* (1974) 6 L.A.C. (2d) 137 (Adams). In the instant case there is no direct evidence to indicate that the applicant changed its position or otherwise relied on the matters it now raises, or that if it did rely on them it did so to its detriment. However, even assuming that such was the case, notice of a reversion to the strict terms of a collective agreement is generally sufficient to bring an estoppel to an end. See: *General Concrete of Canada Ltd.* (1976), 11 L.A.C. (2d) 187 (Beatty). Here the respondent indicated to the applicant in April or May of 1977 how it intended to henceforth interpret its obligations under Article 11.3. Further, the current collective agreement was executed on November 3, 1977, that is some six months after the applicant had indicated that it did not feel obliged to pay the employees for Christmas and New Year's Day when they fell on a Sunday. Thus it cannot be claimed that at the time the current collective agreement was negotiated the applicant could reasonably have relied on the respondent's pre-1973 statement concerning the Interpretation Act as a basis for not seeking any changes to the wording of Article 11.3.

20. The final basis for our conclusion that the doctrine of estoppel is not applicable to these proceedings arises out of the now generally accepted notion that while the doctrine can be relied upon as a defence to an allegation that a collective agreement has been breached, it cannot be used to create positive rights under the agreement. In other words, while the doctrine can operate as a "shield" it cannot be employed as a "sword". See the *Edwards of Canada* case referred to above. It appears to us that the applicant is, in fact, seeking to use the doctrine to create positive rights which are not provided for in the collective agreement.

21. In conclusion, we are satisfied that no mutual agreement was reached concerning the observation of Christmas Day or New Year's Day for the purposes of the collective agreement on any other day than which they were officially observed, namely on December

25th and January 1st. As a result we find that for the purposes of the collective agreement Christmas Day was observed on December 25, 1976 and New Year's Day on January 1, 1977. Since neither of these days was a scheduled day of work it follows from the wording of Article 11.3 that the respondent was not required to pay the employees for either day. It also follows that for the purposes of the collective agreement Boxing Day was observed on December 26, 1977 and thus the respondent was not required to pay holiday rates for work performed on December 27th. In these circumstances, the grievance is hereby dismissed.

DECISION OF BOARD MEMBER A. HERSHKOVITZ:

1. I have had the opportunity of reading the decision of the majority and while I agree with much of the analysis contained therein I cannot concur in the final result.
 2. The relevant article in the collective agreement is Article 11, which has been fully set out in the majority decision. I must point out that Article 11 and its relevant sub-sections might have been framed in less ambiguous terms, by the grieving union, nevertheless, the intent is made evident by Article 11.3.
 3. I find that Article 11.3, and I quote "All hourly-rated employees who have been employed for three months in the calendar year and who report for work on the working day immediately prior to and following Christmas Day or New Year's Day, unless the reason for absence was sickness or accident or authorized leave of absence, shall receive a normal day's pay for each of these two days if they are observed on a scheduled day of work and no work is performed.", is central to the issue. I further wish to draw particular attention to this section commencing with the words "*Shall receive a normal day's pay for each of these two days if they are observed on a scheduled day of work and no work is performed.*"
 4. The facts are not in dispute. The employer did close down its total operation between December 24, 1977 and January 2, 1978. In other words the employer did not require the employees to work on the day immediately preceding Christmas and the day immediately following New Year's Day, as well as the Christmas week in between.
 5. Section 14 of the majority report makes reference to the intent of Article 11.6, which requires mutual agreement. I would submit that the respondent, forfeited his right to the protection of clause 11.6 by his unilateral decision to cease the total operation in order to satisfy his own convenience.
 6. Having regard to the respondent's practice in respect to the non-construction employees as set out in paragraph 16 of the majority decision and the evidence of the respondent's past practice when Christmas and New Year fall on a Sunday, I hold that the respondent did indeed observe Christmas on December 26, 1977 and New Year on January 2, 1978.
 7. Accordingly, I find the respondent is in breach of Article 11 of the collective agreement in failing to pay its employees in accordance therewith.
 8. Because of the foregoing I dissent from the decision of the majority and hold that the employees are entitled to compensation for the two holidays as claimed.
-

1745-77-U Office & Professional Employees International Union,
(Complainant), v. **Racine, Robert and Gauthier Reg'd.**, (Respondent).

Practice and Procedure – Union failure to supply particulars of misconduct – Reverse onus provision does not modify obligation to supply particulars – Complaint adjourned on terms that complainant pay respondent's expenses for the day

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Jacques Sztuke, Janice Best and Alain LeTang for the complainant; F. R. von Veh, M. MacGillivray and Don Campbell for the respondent.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; June 13, 1978

1. The name "Racine, Robert & Gauthier Reg'd." appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Racine, Robert and Gauthier Reg'd.".

2. This is a complaint under section 79 of The Labour Relations Act.

3. In its reply to the complaint, the respondent took the position that the facts set out in the complaint do not reveal a violation of any provision of The Labour Relations Act. It further indicated that should the matter come on for a hearing, it would take the position that section 47(1) of the Board's Rules of Procedure had not been complied with and that the matter should be dismissed at that time. The respondent further advised that it would be seeking costs for all fees and disbursements incurred in regard to the complaint in the event that the Board proceeded to hear the complaint.

4. Rule 47 provides:

47.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

5. At the commencement of the hearing, the respondent made submissions to the Board in accordance with the matters raised in its reply.

6. In its complaint, the complainant set out in paragraph 4 "a concise statement of the matter of each action or omission complained of" as follows:

On or about the 3rd day of February 1978 the grievor was dealt with by Ron Forler General Manager of the respondent contrary to the provisions of sections 58-61 of The Labour Relations Act in that he did on his own behalf or on behalf of the respondent: Discharge the grievor.

7. In paragraph 6 of the complaint, the complainant states that the grievor was a member of the union.

8. Notwithstanding the reference to section 47(1) of the Board's Rules of Procedure contained in the respondent's reply, the complaint furnished no further particulars.

9. At the hearing, as already indicated, the respondent argued that the complaint did not reveal any violation of the Act and that the complaint should be dismissed. The respondent urged that for the Board to allow the complaint to proceed would be to negate the principle set out in *Fleck Manufacturing Limited*, 62 CLLC ¶16,236.

10. The respondent's position, as we comprehend it, was based upon an apprehension that the complainant might seek to introduce, by way of evidence purporting to support the allegation contained in the complaint, statements of material facts, actions and omissions upon which he might seek to rely, but which he had not set out in the complaint and which might, in fact, comprise new allegations.

11. The above cited case dealt with the situation where counsel for the employer indicated at the hearing that he wished to allege impropriety on the part of the union with respect to membership evidence. Counsel gave as an excuse for not filing the allegations and particulars at an earlier date when they had become known to him, that he was not familiar with section 48 (now section 47) of the Board's Rules of Procedure. In its decision, the Board said:

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

Having regard to the untimely nature of the allegations, and of the reason given for not advancing them earlier, and to the fact that copies of the Board's Rules of Procedure containing section 48 are circulated to the public and are readily available to counsel, and to the obvious and unnecessary prejudice which would inevitably have resulted to the applicant if such allegations had been allowed for the first time at the hearing, the Board ruled that it would not entertain them.

12. The Board herein ruled at the hearing, and hereby confirms that ruling, that the allegation set out in the complaint, if proven, would establish that a breach of the Act had occurred. It was also made clear by the Board that the only allegation with which it was concerned was that set out in the complaint. In the Board's opinion, there is no question of the allowance of the introduction of any further allegations, so that the possibility of the negation of the principle of the *Fleck* case (supra) does not arise.

13. The respondent also argued that the failure of the complainant to supply particulars, following the reference in the reply to section 47 of the Board's Rules of Procedure, left the respondent in a position where it could not know the case it was required to meet. It was also upon the basis of that refusal that the respondent requested the Board to dismiss the complaint.

14. In the course of its argument the respondent submitted that the complainant was attempting to avoid the obligations to supply particulars raised by section 47(1) of the Rules by relying on "the reverse onus" provisions of section 79(4a) of the Act.

15. The complainant took the position that the allegation set forth in the complaint contained ample particulars and that, furthermore, the facts upon which it intended to rely in support of its case comprised matters which were within the knowledge of the respondent and which, the complainant argued, consequently need not be set out as particulars.

16. Insofar as the latter position is concerned, it would appear to us that here the complainant may be confusing the question of onus under section 79 with the maxim that the failure of a party or a witness to give evidence which it was within the power of the party or witness to give and by which the facts might have been elucidated, justifies the tribunal in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.

17. The statement of the complainant that it relied upon the knowledge of the respondent is not a proper reply to a request for particulars. Indeed, it would appear to embody a contradiction of Rule 47(1) which requires a statement of the material facts to be relied upon. In the *Ellis Don Limited* case, [1970] OLRB Rep. Aug. 587, the Board, in dealing with a similar situation, said:

While it may be that the applicant is of the belief that the respondent is fully aware of the exact nature of the events complained of, this fact does not deprive the respondent of his right to receive the statement of material facts referred to in section 47 of the Board's Rules of Procedure, nor does it relieve the applicant of the responsibility to provide a concise statement of all such material facts referred to in section 47 especially where the respondent makes a request for such particulars.

See also *Gerton v. Ewart*, [1936] 1 D.L.R. 399 where the Supreme Court, in dealing with a similar rule requiring a concise statement of the material facts, but not the evidence by which they are to be proved, stated that to allow a party to plead reliance upon facts in the knowledge of the other party would lead to an abolition of the rule itself.

18. In order to attempt to clarify the situation with respect to the effect of the reverse onus, we quote, with respectful approval, the following passages from paragraphs 13 and 14 of *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751:

13. The legal effect of the reverse burden, established by section 79(4a) of the Act, has now been considered in a number of decisions of this Board. First of all, it is clear that the reverse burden may be resorted to at the end of a case when the Board finds the evidence so evenly balanced that no clear inference can be drawn. In such a case, the burden, not having been discharged by the employer, the Board must find that the employer's conduct falls within the statutory prohibition. See *Barrie Examiner*, [1975] OLRB Rep. Oct. 745. A secondary implication of the reverse burden is that it also operates to induce an employer to come forward with an explanation of the conduct that is the subject of a complaint. The Board has determined that a complainant need not establish a *prima facie* case of an employer contravention in order for the reverse burden to apply, the filing of a complaint in respect of an employee being a sufficient condition for its application. (See *I.C.B. Warehousing*, [1976] OLRB Rep. Oct. 621.) The lack of any requirement for a complainant to establish a *prima facie* case of an employer contravention means that an employer either must come forward with some evidence in the way of an explanation or run the real risk of the Board facing an evidential situation from which it is unable to draw

any clear inference. Recognizing that, as a practical matter, the employer must provide some evidence in the way of an explanation, the Board when dealing with a complaint to which section 79(4a) applied has adopted as its standard practice the procedure of having the respondent proceed first.

14. The existence of the reverse burden of proof, however, does not mean that the determination of employer motive has now become an easy task for the Board. The Board is still faced with the problem of assessing the evidence presented to it and drawing inferences from that evidence. There are many cases in which employers come forward with plausible explanations of their conduct from which it can be inferred that an employer's conduct is not in contravention of the Act. As a tactical matter, in these cases the complainant must introduce evidence to rebut that inference since, in the absence of any evidence from the complainant, the Board would conclude that the employer has met the burden imposed on it by section 79(4a). The result is that, in most cases, the Board has presented to it evidence from both the employer and the complainant. This evidence must then be assessed and inferences must be drawn. Such factors as the existence of a pattern of anti-union activity on the part of the employer, the employer's knowledge of the existence of union activity and of the employee's involvement in that activity, the manner in which the employee was discharged, and the credibility of the witnesses must all be considered. The Board's responsibility to assess the evidence, therefore, is one that cannot be avoided by seeking refuge in the reverse burden.

The attention of the complainant herein is directed towards the reference to tactics in paragraph 14 above.

19. The Board, notwithstanding the objections, attempted to proceed to hear evidence in an endeavour to expedite the matter. The respondent led off on the understanding that it was proceeding without prejudice to, and subject to its request that the case be dismissed because of the lack of particulars. At the conclusion of the respondent's evidence, the complainant commenced to adduce evidence in support of its allegation. It immediately became apparent, however, that the evidence the complainant sought to lead dealt with incidents and persons concerning which there is no reference whatever in the allegation filed.

20. Objection to this line of questioning was made by the respondent on the obvious basis that it had been given no prior notice of these facts to which the evidence related and, therefore, had not only been unable to properly prepare its own evidence, but would be seriously hampered in attempting cross-examination and reply.

21. Upon being taken by the respondent, the complainant argued that what it sought to introduce was simply evidence and not material facts on which it intended to rely.

22. The Board then attempted to have the complainant supply particulars which the complainant was reluctant to do on the grounds that it was being required to disclose its evidence. Eventually, however, the complainant indicated that it wanted to call evidence

with respect to a number of incidents and referred to statements made by persons on behalf of the respondent, other than the one named in the complaint, who were not present at the hearing.

23. Because of the extent of the areas which the complainant sought to cover, the respondent again moved for a dismissal. The Board, having heard the complainant's further submissions, reserved its decision on the motion and adjourned the hearing in order to consider the issues.

24. In view of the circumstances of this case, and having in mind the position taken by the complainant with respect to Rule 47 and, in particular, its reluctance to "disclose its case", we feel it necessary to refer to some of the Board's decisions relating to that Rule. In saying this, however, we do not wish to be taken to be entirely discounting the complainant's concern about setting out its evidence. There is often a very fine line drawn between what may be a material fact and what may be the evidence by which it is to be established. As a consequence of this difficulty, the Board's rulings, based upon the facts in individual cases, are of little help except insofar as they contain general guidelines in this area. The resolution of each conflict is tempered and controlled by the context in which the conflict arises. It is consequently to the principles set out in the following cases that we direct our attention.

25. Before the existence of Rule 47, the Board, in the *Boake Manufacturing Company Limited* case, 56 CLLC ¶18,042 stated:

The purpose of particulars is to enable opposing parties ... to know what case they have to meet at the hearing so as to save unnecessary expense and to avoid allowing the parties to be taken by surprise at the hearing and to ensure a fair hearing.

26. In the *General Freezer Limited* case, 65 CLLC ¶16,019, the Board was dealing with an application for consent to prosecute; but what it had to say with respect to particulars in that context is relevant in the present issue. It states:

In ruling on the sufficiency and adequacy of material facts and particulars alleged in an application for consent to prosecute for an alleged violation of *The Labour Relations Act*, the Board, will, therefore, consider and have regard to such matters as:-

- (1) Whether the allegations substantially identify and describe the offences alleged and indicate the acts or omissions and the time when and place where they occurred and give the names of the persons who committed or engaged in them;
- (2) The knowledge or availability of knowledge possessed by the parties of the circumstances and details of the alleged violations;
- (3) Whether the language of the allegations and the absence of certain particulars are likely to mislead, confuse or cause real prejudice to the opposite party in the preparation of its defence;

(4) Whether additional particulars sought or demanded are merely descriptive of the evidence by which they are to be proved rather than of the acts or omissions and the time when and place where they occurred and the names of the persons who engaged in or committed them.

(5) The nature and circumstances of the violations alleged;

(6) Whether particulars demanded are likely to be required by the party demanding them for the *bona fide* purpose of preparing his defence or whether they are more likely being demanded solely as a technical matter for the purpose of harassing and embarrassing the applicant and to create delay in the disposition of the application.

27. In *International Cooleridge Company of Canada Limited*, [1965] OLRB Rep. Apr. 1947, the Board indicated that the test for determining the adequacy of particulars is whether the statement of material facts is so indefinite or incomplete as to hamper the other party in the preparation of its case. The Board explained that this means that the party charged must be in a position to prepare for cross-examination of the witnesses called by the party making the charges and to know what witnesses it has to have available in rebuttal.

28. In the *Ellis Don Limited* case (*supra*), the Board pointed out that the applicant is required by Rule 47 to describe the material facts, actions or omissions which support the allegations. The Board explained that there was no need to set out the evidence nor to identify the witnesses but that (and this is the important part of the reference) the particulars must sufficiently describe the actions or omissions complained of so that the opposite party may direct his attention to such matters in order to properly prepare his case.

29. In the *Ellis Don Limited* case, the Board went to the extent of setting out an example of what the particulars might have been in that case. The case dealt with an application for leave to prosecute on counselling an unlawful strike but the example is nonetheless useful in the present circumstances. What the Board had to say follows:

In the instant case, depending upon what the facts actually are, the applicant might have filed a statement which alleged that the respondent called a meeting of the applicant's employees or distributed a leaflet to the applicant's employees which caused them to cease work or refuse to work in combination or in concert or in accordance with a common understanding. Such allegations are readily distinguishable from the evidence by which the allegations would be proved. By way of example, the evidence to prove such material facts, actions or omissions might consist of testimony concerning the manner in which the respondent called the meeting, evidence identifying those persons who were in attendance at the meeting and evidence as to what the respondent said to those in attendance. On the other hand, the evidence adduced might establish that the respondent was seen handing out leaflets to the applicant's employees and the leaflet, which could be identified and filed as an exhibit at the hearing, would speak for itself.

30. The provisions of section 47(1) are, as is made plain in the other subsections of the Rule, not rigid. Even in the absence of these subsections, it is doubtful if the rule could be said to be an inflexible rule of law. Its purpose has been stated in the cases cited above. It is obviously a procedural rule and not one intended, at least not on an initial non-compliance, to dispose of any right or legitimate claim to relief that may be available to the person affected. On the other hand, of course, the rule cannot be ignored. Certainly a failure or a refusal to comply with the rule following a request by the opposite party or a direction by the Board to supply particulars may not only result in curtailment of the scope of the evidence, but in some circumstances may cause the Board to dismiss the case entirely.

31. The rule, however, as indicated above, provides for the exercise of discretion by the Board with respect to permitting the late filing of particulars upon such terms and conditions as the Board considers advisable. In the past the Board, in circumstances similar to those existing in the present case, has granted an adjournment and allowed a complainant to furnish late particulars rather than be subjected to dismissal, provided it undertook to pay a reasonable sum of money to the other party for the purpose of defraying the expenses of the opposite party.

32. In view of the fact that the complainant was made aware of the requirements of Rule 47 before the hearing and failed to meet them, thus causing delay and unnecessary expense, but also, having in mind the desirability of disposing of this complaint on its merits, the Board, in lieu of dismissal, proposes to follow the above procedure.

33. Accordingly, the Board directs that this matter be listed for continuation on condition that the complainant undertakes to pay to the respondent an amount to be determined by the Board as a reasonable and fair contribution towards the expenses of the respondent for the first day of the hearing.

34. The Board further directs that if the complainant intends to proceed with the complaint, it is to furnish the respondent and the Board with a concise statement of all the material facts upon which it intends to rely in support of the allegation set out in the complaint, but not the evidence by which they are to be proved. The statement of the material facts is to be provided, as directed, within ten days of the date hereof.

DECISION OF BOARD MEMBER, J. D. BELL:

1. I dissent.

2. In view of the complainant's failure to comply with Rule 47 with respect to the particulars, I would have dismissed the complaint.

0311-78-R Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Applicant). v. **RIVERSIDE ROOFING LIMITED**, (Respondent), v. Sheet Metal Workers' International Association, Local Union 235, (Intervener).

Certification – Construction Industry – Collective Agreement – Board held that the transition provisions plugging the parties into the province wide bargaining scheme on the expiration of their existing agreements could not operate as a bar to an otherwise timely certification application

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members H.J.F. Ade and O. Hodges.

APPEARANCES: *Ed Vanderkloet and John Kamphof for the applicant. J. McNamee and R. Paterson for the intervener; no one appeared for the respondent.*

DECISION OF THE BOARD; June 29, 1978

1. The respondent company was served with proper notice of this application for certification and of the time and place of hearing in this matter. The respondent company did not file a reply to the application and chose not to appear at the hearing or to be otherwise represented at the hearing.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.
4. The Board hereby affirms its oral finding given at the hearing that the respondent company and The Sheet Metal Workers' International Association, Local Union 235, the intervener, were parties to a collective agreement which expired April 30, 1978 covering the same employees for which the applicant now seeks bargaining rights. The applicant, therefore, seeks to displace the intervener as bargaining agent. In these circumstances the Board follows its normal practice and finds the appropriate bargaining unit to be the one which has proven to be viable and is set out in the previous collective agreement. Accordingly, the Board hereby finds all built-up roofing employees of the respondent employed in the counties of Essex and Kent save and except foremen, persons above the rank of foreman and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. Counsel for the intervener took the position that there was only one bargaining unit employee at work on the date of the application. Having regard to the provisions of Section 6(1) of the Act he argued that the applicant cannot be certified for a bargaining unit of one employee. The applicant argued strongly that there were 4 employees at work on the application date and that cards were submitted for all 4. The Board hereby appoints Mr. R. Malkin, Labour Relations Officer to meet with the parties and to review the employment records of the respondent and to report to the Board the names of those bargaining unit employees who were at work on May 10, 1978, the date of application.

6. The intervener argued that "if the documentary evidence of membership submitted by the applicant is the same as that submitted with respect to an earlier application the application should be dismissed on that basis." The Board accepts as valid membership evidence documents which satisfy the statutory requirements set out in section 1(1)(j) of the Act which have been signed by the person seeking membership within the 12 month period preceding the date of application. The Board accepts membership evidence which meets these criteria even if filed in a prior application. There was no challenge to the quality of the membership evidence in the prior application in this matter nor was there a challenge made in this application. The evidence filed in this case meets the criteria articulated above and accordingly, the Board finds it to be valid membership evidence which goes to support the application.

7. The intervener argued in the alternative that the employment of five members of the Christian Labour Association of Canada, the applicant, was in violation of the collective agreement between the intervener union and the company and constitutes employer support for the applicant within the meaning of Section 12 of the Act. Counsel for the intervener did not establish that the persons who now support the applicant were hired in violation of the previous collective agreement and accordingly, even if the Board was prepared to find the action complained of constituted support within the meaning of Section 12 of the Act, it could not make that finding in this case.

8. The intervener argued thirdly, in the alternative that the instant application is barred by virtue of section 132(3) of The Labour Relations Act. Section 132(3) of the Act provides:

"Where any collective agreement mentioned in sub-section 1 ceases to operate, the affiliated bargaining agent, the employer and the employees for whom the affiliated bargaining agent holds bargaining rights shall be bound by the provincial agreement between an employee bargaining agency representing the affiliated bargaining agent and the employer bargaining agency representing the employer."

Counsel for the intervener argues that section 132(3) of the Act is a section designed to provide stability in the ICI sector of the construction industry during the transition period when the recently enacted section of the Act establishing bargaining structures in the ICI sector are put in place. He argued that the words of section 132(3), which are mandatory, make it clear that where a collective agreement of the type to which the intervener and respondent were party ceases to operate, "the affiliated bargaining agent, the employer and employees for whom the official bargaining agent holds bargaining rights shall be bound by the provincial agreement" made between the employer bargaining agency and the employee bargaining agency. He referred the Board to section 126 of the Act which states:

"Where there is a conflict between any provision in sections 127 to 136 and any provision in sections 5 to 49 and 54 to 124, the provisions in sections 127 to 136 prevail,"

and argues that the mandatory provisions of section 132(3) must prevail over the provisions of section 5 under which the applicant seeks to displace the intervener.

9. The Board has not been persuaded by the representations of counsel for the intervenor. Section 132(3) of the Act makes it clear that only employees for whom the affiliated bargaining agent holds bargaining rights are bound by the provincial agreement referred to in the section. The section does not override those sections of the Act which provide for the employee selection of a bargaining agent but rather, is made conditional on the continuation of the bargaining rights held by the affiliated bargaining agent in respect of the affected employees. If the affiliated bargaining agent no longer holds bargaining rights as of the date the provincial agreement referred to in section 132(3) is entered into then the provincial agreement binds only those employees for whom the affiliated bargaining agent holds bargaining rights as of that time. The section is not designed to nor does it bar a timely application for certification. The section channels bargaining to the provincial level, binds the employer and the affiliated bargaining agent to the provincial agreement and effectively bars any collective agreements which might be negotiated between the individual employer and the affiliated bargaining agent.

10. This matter is hereby referred to the Registrar.

1858-77-U Bakery & Confectionery Workers' International Union of America, Local 264, (Complainant), V SANDRA INSTANT COFFEE COMPANY LIMITED, (Respondent).

S-79 – Discharge for Union Activity – Duty to Bargain in Good Faith – Employer agreeing to reinstate discharged employees who have not been convicted of criminal offence – Employees receiving conditional discharge but not “convicted” – No requirement to reinstate until employees fulfill the condition

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members E. Boyer and W. H. Wightman.

APPEARANCES: *E. G. Posen and John Miller for the complainant; A. A. White, G. R. Ingrams and Paul Higgins for the respondent.*

DECISION OF THE BOARD: June 5, 1978

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that certain named persons have been dealt with by the respondent contrary to the provisions of sections 14 and 58(a) of the Act.

2. The sections referred to above provide, respectively, as follows:

14. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

3. On November 8, 1977, the complainant and the respondent signed a Memorandum of Agreement which brought about the cessation of a lawful strike of employees of the respondent represented by the applicant.

4. The Memorandum of Agreement contained the following paragraph:

The parties agree to recommend to their principals without reservation, as a settlement of all matters in dispute the provisions of Exhibit B as amended by Exhibit A, both of which are attached hereto.

5. The union advised the Board at the hearing that the list of employees alleged to have been affected by the conduct of the respondent had been reduced to Don Lennox, Tony Johnston and Allan Andrews, and that the complaint was withdrawn with respect to all of the other employees on the list.

6. Exhibit "A" to the Memorandum contains a number of sections which are either new to, or contain proposed alterations to, the provisions of Exhibit "B" which is in the form of a collective agreement. Exhibit "A" also contains items which relate to incidents obviously connected with the strike and its cessation.

7. One of those items appears in Exhibit "A" under the heading "Return to Work". It states:

RETURN TO WORK

The Company undertook to reinstate within 90 days of the ratification of the Agreement those employees* on strike who had at least one year's seniority at the time of the commencement of the strike.

The remainder of the employees* on strike will be recalled as production requirements dictate.

* This does not include the employees who have been charged by the police. However, those presently charged will be added to the list of those eligible for recall if they are not convicted, including if the charges are dropped.

8. The union complains that the company has failed to carry out the terms of the above undertaking and that it is consequently in breach of sections 14 and 58 of the Act.

9. The company takes the position that the persons referred to in the complaint are ineligible for recall under the terms of the Memorandum of Agreement and the Collective Agreement.

10. It is obvious that if the undertaking were part of a collective agreement, the matter should be dealt with through arbitration rather than through this Board.

11. The Board, however, has found in a concurrent case between the parties (Board File No. 1857-77-U) that neither the document referred to therein as a collective agreement nor the Memorandum, constitute a collective agreement within the meaning of the Act.

12. In any event, it is doubtful that the parties intended that the undertaking should form part of the Collective Agreement. It did not appear in any of the drafts of collective agreements dealt with in Board File No. 1857-77-U. In the Memorandum, it is the first among a number of items dealing with the settlement of matters arising out of the strike and its cessation. These items follow the clauses and amendments in the Memorandum that would normally comprise the terms of a collective agreement. The clauses are, nevertheless, obviously conditions governing the overall settlement and have a validity of their own as bargaining items quite apart from, but as preconditions to the signing of a collective agreement. They deal with Ratification, Picket Line Problems, Damages, Criminal Charges, Employee Information (this is information with respect to original, i.e., pre-strike employees) and Media (dealing with statements to the media).

13. The company made it quite clear at the hearing that it intended at all times to carry out its undertakings and, in particular, those arising out of the "Return to Work" clause. Its contention was, however, that the three persons named above had not met the conditions set out in the clause and that, consequently, it was not obliged to re-employ them.

14. The three persons with whom we are concerned appeared in Court on charges arising out of picket line activities. They were given conditional discharges on December 12, 1977 and directed to keep the peace for a period of twelve months. Each received the obligatory warning to the effect "that if you breach the terms of probation you will be committing a criminal offence, and if you are convicted of such an offence you can be fined up to \$500.00 or sent to prison for six months or you can be both fined and imprisoned; in addition you could be brought back in front of me and I could vary the terms of probation, extend the period of probation or revoke the discharge, convict you and sentence you in respect to these charges".

15. The attention of the Board was directed to section 662.1(1) of the Criminal Code which provides as follows:

Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.

16. The position of the company was that, since the disposition by the Court involved

a plea of guilty by the employees concerned, that brought them within the meaning of the word "convicted" according to the intent of the parties.

17. The company argued that, in any event, there had been no consideration given by either party at the time the Memorandum was entered into to the matter of conditional discharge and the undertaking was based upon the guilt or innocence of those accused of offences.

18. Furthermore, as we understand it, the company took the position that the ultimate decision could not be reached until the conclusion of the probationary period during which a conviction could still be made if the probations were breached.

19. The questions which the Board must ask itself are whether, in the above circumstances, the company can be said to have bargained in bad faith and whether its action in refusing to reinstate is a breach of section 58 of the Act.

20. The Board finds that the Memorandum of Settlement and the "Return to Work" clause were the result of bargaining in good faith by both parties. The quarrel between them is one involving the interpretation of a clause in the Memorandum, upon the wording of which they obviously agreed.

21. Without at the moment attempting to reach a decision with respect to the difference between the parties on the interpretation of the clause, we would point out that the position taken by the company, whether correct or not, is not a frivolous nor unreasonable one in the circumstances. It is at least not an arbitrary refusal to fulfil its undertaking but one based upon an arguable question of intent arising out of the language of the Memorandum and its failure to deal directly with the alternative disposition of conditional discharge provided for in the Criminal Code.

22. The Board accordingly finds that the company has not violated section 14 of the Act. The Board further finds, on the basis of all of the foregoing, that the company has not violated section 58 of the Act.

23. The Board's findings do not, of course, resolve the question as to the proper interpretation of the "Return to Work" clause as it affects the employees named above. The Board is aware that an answer to that question may contribute to the settlement of the other matters in dispute to which reference was made in Board File No. 1857-77-U.

24. Although it may be questionable as to whether the Board has the jurisdiction to resolve the question, it appeared to the Board that the parties were looking to it for an opinion as to the correct interpretation to be placed upon the "Return to Work" clause. With that understanding in mind, the Board has set out below its opinion on the matter.

25. The question is whether employees who have been given a conditional discharge by the Court fall within the category of employees who have been charged by the police but who are entitled to be placed on the recall list as "Not Convicted".

26. It is trite to say that the intent of the parties must be sought in the clause itself and that the latter must be so interpreted as to best effectuate the intention of the parties.

The parties herein, having chosen to use legal terms, must be presumed to have had in mind the legal meaning and implications of the terms they employed.

27. It is a fact that a conditional discharge is based upon either a person either pleading guilty to, or being found guilty of, an offence. The Criminal Code, however, in the section cited above, distinguishes between guilt and conviction and it is to conviction and not to guilt or innocence that the parties addressed themselves in the "Return to Work" clause. In this connection and as a further guide to intent, it should be noted that the parties agreed upon the eligibility for recall of persons charged in the case where the charges were dropped. The dropping of charges does not, of necessity, reflect the innocence of the accused but, as must be apparent to all, may occur for reasons having nothing to do with the question of guilt or innocence. The point may be a minor one but the acceptability of the dropping of the charges as a key to recall is an indication of the fact that the minds of the parties were directed towards the question of actual conviction rather than towards guilt or innocence.

28. In any event, it was obviously open to the parties to say if such had been their intent, that only employees who were acquitted or against whom the charges had been dropped, would be added to the recall list. The parties, however, chose to express their intent by using the words "Not Convicted" rather than the word "Acquitted". This choice of words can only mean that it was the intent of the parties to deny recall only to those employees who had been or might be convicted of the offences with which they were charged and to clear the way for those who were not convicted.

29. The three employees, as already observed, were given conditional discharges "instead of", as the Criminal Code provides, convictions. They therefore appear, at this moment in time, to fit conditionally into the category of employees entitled to be on the recall list by reason of non-conviction. The difficulty, however, is that the final disposition of the matter by the Court must await the expiry of the probationary period or the occurrence of a breach of the conditions during probation.

30. It would appear to us that, in the absence of any time stipulation in the "Return to Work" clause relating to conviction, the right to recall for "non-conviction" must await the final disposition of the matter by the Courts. The conditional discharge means that, at the present moment in time, the accused, although guilty, have not been convicted, but may yet be convicted, depending upon their conduct. The situation thus lacks finality.

31. In the circumstances, it is our opinion that the three persons involved are entitled to be placed on the recall list in the category of employees "not convicted", but only when the probationary period is successfully completed.

0556-78-U STEWART & HINAN CONTRACTORS LIMITED,
 (Applicant), v. United Steelworkers of America, Local 13173, and Mr. Ken
 Ashton, (Respondents).

Strike – Employees engaged in primary picketing in connection with a lawful strike – Employees of subcontractors refusing to cross picket line – Cease and desist direction available to end unlawful strike involving concerted refusal to cross picket line but no order made or possible concerning the picketing

BEFORE: R. A Furness, Vice-Chairman.

APPEARANCES: *G. Grossman and John Kilmer appearing for the applicant; and A. E. Munro and Brian Shell appearing for the respondents.*

DECISION OF THE BOARD: June 27, 1978

1. The applicant has applied for relief under section 123 of The Labour Relations Act.
2. In Schedule "A" to its application, the applicant set forth the following allegations with respect to the facts of this application:
 1. STEWART & HINAN CONTRACTORS LIMITED ("Stewart & Hinan") is general contractor to Eldorado Nuclear Limited and is engaged in constructing a new Health, Safety and Security Building on John Street in Port Hope, Ontario.
 2. Stewart & Hinan for the purposes of constructing the building referred to in paragraph 1, use Gate 16 on John Street as a construction entrance. Approximately 100 feet north of Gate 16 is another entrance used by Stewart & Hinan for equipment, men and materials. Adjacent to Gate 16 is a job sign stating Stewart & Hinan General Contractors, Lincoln, Ontario. Stewart and Hinan is only permitted to use Gate 16 and the entrance to the north of Gate 16 because security clearance is needed to enter all other gates. The main gates used by the employees of Eldorado Nuclear Limited are at the extreme north and extreme south of the John Street property.
 3. On June 9th, 1978, the United Steelworkers of America, Local 13173 ("USWA") commenced a lawful strike against Eldorado Nuclear Limited. At approximately 6.15 a.m. on June 9th, 1978, approximately 10 pickets appeared at Gate 16. The pickets carried hand-painted signs stating, "Local 13173 USWA on legal strike". By approximately 7.30 a.m. the number of pickets at Gate 16 increased to approximately 35. As a result of the said picketing, employees of Leader Structure (Toronto) Limited ("Leader Structures"), sub-contractor to Stewart & Hinan, refused to commence work as they were scheduled to do, thereby engaging in an

unlawful strike. Similarly, employees of Reycor Electric Ltd., sub-contractor to Stewart & Hinan, refused to commence work as they were scheduled to do, thereby engaging in an unlawful strike. Approximately 400 employees of Eldorado Nuclear Limited, members of USWA, Local 13173, picketed the property of Eldorado Nuclear Limited located on John Street in Port Hope, Ontario.

4. On Monday, June 12th and Tuesday, June 13th, picketing continued at the John Street job site and employees of the sub-contractors referred to in paragraph 3 above, refused to commence work as they were scheduled to do, thereby engaging in an unlawful strike. Late Tuesday afternoon, the Applicant sent telegrams to the sub-contractors, advising them that the walkout was illegal.

On Thursday, June 15th, 1978, at approximately 7.30 a.m., there were 30 – 40 pickets at Gate 16 and, as a result of picketing, the sub-contractors' employees would not cross the picket line, thereby engaging in an unlawful strike.

5. Towards the end of the week of June 16th, 1978, Quentin Begg, Business Agent for United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council, spoke to Mr. Ken Ashton, President of Local 13173 of USWA and an employee of Eldorado Nuclear Limited. Mr. Ashton said that Local 13173 would not remove the pickets and that there was no way that the carpenters were going to be allowed to go back to work. Mr. Ashton also stated that if they did try to go back, Local 13173 USWA would put all 400 guys at the gate.
6. Picketing continued June 16th, 19th and 20th and employees of sub-contractors refused to cross the picket line, thereby engaging in an unlawful strike. The United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council, is not in a legal strike position against Leader Structures and Local 894 of the International Brotherhood of Electrical Workers is not in a legal strike position against Revcor Electric Ltd.

3. In their reply, the respondents stated:

The respondent is the bargaining agent for a group of employees of Eldorado Nuclear Limited at Port Hope, Ontario.

The respondent was certified for this bargaining unit under the Canada Labour Code.

The strike engaged in by the members of the respondent union is a lawful strike under the Canada Labour Code.

The respondent respectfully submits that this application should be dismissed on the following grounds:

(a) Since the collective bargaining relationship between Eldorado Nuclear Limited and United Steelworkers of America falls within the jurisdiction of the Canada Labour Relations Board, then the Ontario Labour Relations Board lacks jurisdiction in this matter.

IN THE ALTERNATIVE:

(b) The alleged violation of Sections 66 and 67 of the Ontario Labour Relations Act are not well founded since any activity complained of has been in connection with a lawful strike.

4. At the hearing the respondents raised an additional objection to this application when it argued that neither the respondents nor Eldorado Nuclear Limited came within the ambit of section 123 of The Labour Relations Act.

5. The Board informed the parties that for the purpose of argument it would assume, without deciding, that the facts as alleged by the applicant were established before the Board and that the Ontario Labour Relations Board rather than the Canada Labour Relations Board has jurisdiction to entertain this application for relief.

6. The Board heard argument on whether this application was properly made pursuant to section 123 and on whether the respondents had violated section 67. At the conclusion of the argument during the hearing on June 26, 1978, the Board dismissed this application and stated that its reasons would be given in writing. The Board now sets forth its reasons.

7. With reference to whether this application is properly made pursuant to section 123, the Board refers to section 106 wherein "employee" is defined in section 106(b); "employer" is defined in section 106(c); and "trade union" is defined in section 106(f). The definitions in section 106 apply in section 106 and in sections 107 to 124. Section 123 states:

123. - (1) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions, counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

8. It was not argued that the respondent trade union is a trade union within the meaning of section 106(c), and, on the representations before it, the Board is not prepared to find that the respondent trade union is a trade union that according to established trade union practice pertains to the construction industry. The applicant desires certain relief against the respondent trade union and Mr. Ashton. However, since the respondent trade

union is not a trade union within the meaning of section 106(c) and Mr. Ashton is not an officer, official or agent of such a trade union, the Board does not have the jurisdiction under section 123 to direct either of the respondents to do or refrain from doing with respect to the unlawful strike by employees of the applicant's sub-contractors.

9. Would the Board have jurisdiction to entertain this application if it had been made under section 82? Under the provisions of this section "employer" does not have a special meaning, "employee" is merely defined as including a dependent contractor under section 1(1)(gb) and "trade union" as defined in section 1(1)(n) is the basic definition of a trade union in The Labour Relations Act. There is no dispute that the respondent trade union is a trade union within the meaning of section 1(1)(n). However, even if the applicant had made a similar application under section 82, the provisions of section 67 are relevant to a consideration of the alleged facts of this application. Section 67 provides:

67. – (1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) *Subsection 1 does not apply to any act done in connection with a lawful strike or lawful lock-out.* (Emphasis supplied).

10. The strike which has been engaged in by employees of Eldorado Nuclear Limited is apparently a lawful strike under the Canada Labour Code. However, it may be argued that the respondents have done an act which they know or ought to know that, as a probable and reasonable consequence of such act, another person or persons would engage in an unlawful strike? Certain employees of Eldorado Nuclear Limited have, while engaged in a lawful strike with respect to Eldorado Nuclear Limited, picketed the latter's premises and the employees of the applicant's sub-contractors have engaged in an unlawful strike in refusing to cross the picket line.

11. In the *Canteen of Canada Ltd.* case, Board File No. 1715-77-U, unreported decision dated March 28, 1978, the Board considered an application under section 82 where an employer was seeking a direction restraining picketing of its premises at Cambridge and Windsor and a direction requiring a respondent trade union to instruct its members employed by the employer at the location in Windsor to return to work forthwith. The employees in the bargaining unit represented by Retail, Wholesale and Department Store Union, Local 414 ("Local 414") were engaged in a legal strike against Canteen of Canada Ltd. ("Canteen"). A collective agreement between Local 414 and Canteen covered employees at another location in Ontario. The collective agreement did not cover Canteen's location in Windsor where another local of Retail, Wholesale and Department Store Union had a collective agreement with Canteen. Local 206 of the Retail Clerks International Union ("Local 206") was bargaining for a new collective agreement with respect to Canteen's employees at its location in Cambridge and was not in a position to call a lawful strike.

12. Pickets from Local 414 picketed Canteen's locations where Canteen's employees were engaged in a lawful strike. In addition, pickets from Local 414 picketed Canteen's locations at Windsor and Cambridge. Eventually the employees at Cambridge refused to cross the picket line. Picketing at Canteen's location in Windsor was performed by employees of Canteen who were represented by Local 414 and who were on a lawful strike. Leaflets

were handed out which did not attempt to persuade Canteen's employees at Windsor to honour the picket line but which did ask such employees to boycott Canteen's products. Some of these employees refused to cross the picket line. As in the instant application, the application was not brought against the employees who refused to work because of the picket line. The Board in the *Canteen of Canada Ltd.* case, *supra*, referred to sections 63, 65, 66, 67, 82, 83, 83a and 123 and concluded that while none of these sections expressly referred to the act of picketing, it was apparent that the provisions of section 65 and 67 are sufficiently wide to prohibit at least some incidents of picketing. After an analysis of the Board's jurisprudence and The Labour Relations Act, the Board stated at paragraphs 34 and 35:

34. In Ontario the legislative emphasis has been in a different direction, focusing upon the lawfulness of strike activity, rather than upon picketing. A concerted refusal to work is considered to be a strike regardless of whether it is in response to the presence of a picket line. Moreover, picketing not in connection with a lawful strike that causes other employees to strike, is considered to fall within the prohibitions set out in section 65 and 67. Falling outside of these provisions, however, is picketing done in connection with a lawful strike. If such picketing causes other employees to engage in an illegal strike, then that illegal strike, but not the picketing that causes it, can be the subject of a Board direction. This conclusion does not necessarily mean that such picketing is permitted by the general civil and criminal law. Rather, it simply means that picketing done in connection with a lawful strike is not touched directly by the Board's remedial authority as set out in the *Labour Relations Act*. Accordingly, if persons wish to restrain such picketing, they must seek their remedy in the Courts.

35. The picketing that is the subject of this application, in the Board's view, has been done in connection with a lawful strike. The pickets that appeared at Windsor and Cambridge represented the Toronto employees who were engaged in a lawful strike against the applicant. The striking Toronto employees were clearly attempting to resolve that dispute by asserting greater pressure upon the applicant through picketing its other operations. In these circumstances, the Board must conclude that the picketing was done in connection with a lawful strike.

13. The reasoning of the Board in the *Canteen of Canada Ltd.* case, applies to the alleged facts of this application, and the Board finds that it would not have the remedial authority to issue a cease and desist direction (even if this application had been made under section 82) in circumstances where the respondents' conduct occurs in connection with a lawful strike against Eldorado Nuclear Limited. Accordingly, it was for these reasons that the Board dismissed this application.

1654-77-M Hero Werkman, (Applicant), v. London and District Service Workers' Union Local 220, (Respondent Trade Union), v. **VICTORIA HOSPITAL CORPORATION**, (Respondent Employer).

Religious Objectors – Employee becoming bound by agreement as a result of amalgamation of hospitals – Employee entitled to exemption from union security provisions of subsisting agreement

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *Gerald Vandezande appearing for the applicant; Ted Wohl and Charles Davidson appearing for the respondent trade union; Laurence B. Heffernan appearing for the respondent employer.*

DECISION OF THE BOARD: June 2, 1978

1. The applicant has applied on the grounds of religious conviction or belief to be exempted from the union security provisions contained in a collective agreement between the respondent trade union ("Local 220") and the respondent employer ("Victoria Hospital"). Local 220 has adopted the position that the application is untimely.

2. The relevant provision under The Labour Relations Act is section 39, which states as follows:

39. – (1) Where the Board is satisfied that an employee because of his religious conviction or belief,

- (a) objects to joining a trade union; or
- (b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause a of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the Income Tax Act (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

- (a) subject to clause b, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in

subsection 1 is first entered into with that employer and only during the life of such collective agreement; and

(b) where a collective agreement in force before the 15th day of February, 1971 contains the provision mentioned in subsection 1, the employees in the employ of the employer on the 15th day of February, 1971 and only during the life of such collective agreement.

3. The applicant is employed at what is now referred to as the Westminster Campus of Victoria Hospital in London, Ontario. Prior to October 3, 1977 this facility was operated as a veterans hospital by the Federal Department of Veterans Affairs under the name of the Westminster Hospital. Pursuant to the terms of an agreement between the Federal Government and the Province of Ontario, on October 3, 1977 Westminster Hospital became part of Victoria Hospital, which is a public hospital also located in the City of London. Some 1,300 employees working at Westminster Hospital at the time of the change ceased to be employees of the Federal Government and became employees of Victoria Hospital. One of the terms of the agreement between the two governments was that the employment of the Westminster Hospital staff would be continued without any loss of salary or benefits.

4. The applicant commenced working at Westminster Hospital in 1964. While an employee of the Federal Government the grievor came within a nation-wide bargaining unit of hospital employees represented for collective bargaining purposes by the Public Service Alliance of Canada. Since approximately 1970 the collective agreements relative to this bargaining unit have provided for the mandatory payment of union dues for all employees with the exception of those who have completed an affidavit stating that they belong to a religious organization whose doctrine prevents them as a matter of conscience from making financial contributions to a union. The applicant filed the necessary affidavits so as to excuse himself from having to pay union dues, although, pursuant to the terms of the collective agreements, he did make equivalent monetary payments to a charitable organization.

5. As a consequence of the transfer of Westminster Hospital to Victoria Hospital, the grievor found himself covered by the terms of the collective agreement between Local 220 and Victoria Hospital. Pursuant to an agreement between Victoria Hospital and the Union he and the other Westminster employees had their existing seniority standing recognized for the purposes of the Local 220 collective agreement. It should be stressed that at no time was the applicant obliged to apply for employment with Victoria Hospital. After October 3, 1977 he continued to perform the same work at the same location, although now as an employee of Victoria Hospital rather than of the Federal Government.

6. Victoria Hospital and Local 220 have been parties to a series of collective agreements dating back to at least 1966. All of the collective agreements since that time have contained a union security clause which makes the payment of union dues a mandatory condition of employment. The collective agreement in place at the time that Westminster became part of Victoria Hospital was executed on November 30, 1976 and was stated to expire on March 31, 1978. This application was filed on January 31, 1978.

7. The position of Local 220 is essentially that since a series of collective agreements have existed between itself and Victoria Hospital containing the union security clause referred to above, the applicant is simply too late to request an exemption. If one were to accept

Local 220's contention, it would appear that pursuant to clause (b) of section 39(2) the last time an application could have been made for an exemption from the union security clause would have been at some point in 1971. In 1971, of course, the applicant had no connection at all with Victoria Hospital.

8. As an aside, it is interesting to note that one of the earliest cases involving the interpretation of the time limits provided for in section 39 involved Victoria Hospital and Local 220. (See the *Victoria Hospital Board of Trustees* case [1972] OLRB Rep. March 277). A collective agreement between the parties had expired on December 31, 1970 and a new agreement did not become effective until July 16, 1971. An application for religious exemption was filed by an employee on March 18, 1971, that is during the time when no agreement was in force. Before the Board Local 220 took the position that since section 39(2) referred to applications being made during the life of an agreement which was in effect on February 15, 1971, and there was no agreement in effect on that date, the application could not succeed. This submission was not accepted by the Board. In reaching its conclusion in this regard the Board at the time made the following comments concerning the principles relevant to the interpretation of section 39:

11. It is to be noted that the final paragraph of section 39 specified the employees to whom the section does not apply. Among the employees to whom the section does not apply are those whose employment commences after the entering into a collective agreement when clause (a) applies. The applicant is not one of that class of employees. The other class of employees specified comprises persons whose employment commences on or after the 15th day of February, 1971. The applicant does not fall within that excluded class either. The applicant would thus appear to have fallen into some sort of legislative limbo. Having in mind the remedial nature of the statute, it would appear that it ought to be interpreted so as to afford relief to persons in the applicant's position unless a clear intent to deny them the benefits of the enactment is readily discernible.

13. It has been said with respect to an enquiry into the meaning of a statute that:

"A statute is the will of the Legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that it is to be expounded "according to the intent of them that made it" . . . The object of all interpretation of a statute is to determine what intention is conveyed either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it . . . (Maxwell on Interpretation of Statutes 9th Ed. pp. 1-2)".

14. In addition, section 10 of the Interpretation Act, R. S. O. 1970, c. 225 states:

"Every act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be

contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”

15. We propose to examine the provisions of section 39 of The Labour Relations Act in the light of the foregoing principles.

9. As did the Board in the earlier Victoria Hospital case, we propose to examine the provisions of section 39 of the Act in light of the principles therein set forth, including the apparent intent of the Legislature in drafting the section.

10. Clause (b) of section 39(2) would now appear to have little or no importance due to the passage of time since February 15, 1971. However, in examining the remainder of the section it is clear that it envisages that when a union security clause is first negotiated into a collective agreement as a condition of employment, an existing employee who objects to joining the union or paying union dues on the basis of his religious conviction or belief can apply for an exemption. The rationale behind this provision would appear to be that since the terms of the union security clause did not constitute a condition of employment when the employee first became employed, there is an element of unfairness associated with putting him in a position of having to choose between quitting his employment or abiding by the union security clause notwithstanding that to do so would violate his religious convictions or beliefs. However, the situation with respect to new hires where a union security clause is already in effect is somewhat different. Section 39 provides such employees with no opportunity to apply for the religious exemption. The logic here would seem to be that since the person involved took the job notwithstanding the presence of a union security clause, he cannot in all equity later claim an exemption from the effect of the clause.

11. The applicant commenced his employment at Westminster Hospital when no union security clause was in effect. Thus it cannot be said that the grievor entered into his current job notwithstanding the existence of such a clause. Although he continued to do the same work at the same location, the applicant on October 13, 1977, found himself covered for the first time by a collective agreement containing a mandatory union security clause. Having regard to the purpose underlying section 39, we are satisfied that this situation meets the requirements of section 39(2)(a), and that the applicant was entitled to bring this application prior to the expiry of the then current collective agreement, which he did.

12. In light of the material before it, the Board is satisfied that the applicant is an employee of the respondent employer who, because of his religious conviction or beliefs, objects to joining the respondent trade union and objects to the paying of union dues or other assessments to the respondent trade union.

13. The Board therefore orders and directs that the provisions of the collective agreement between the respondent employer and the respondent union which are of the type mentioned in section 38(1)(a) of the Act do not apply to the applicant and accordingly the applicant is not required to join the respondent union, to be or to continue to be a member of the respondent union or to pay any dues, fees or other assessments to the respondent union provided that amounts equal to any initiation fees, dues or other assessments are paid by the applicant to or are remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and the respondent union.

14. However, if the applicant and the respondent trade union fail to agree on such charitable organization, the Board, upon the request of either the applicant or the respondent union, will designate pursuant to the provisions of section 39(1) of the Act a charitable organization registered as such in Canada under Part I of the Income Tax Act (Canada).

CASE LISTINGS MAY 1978

	Page
1. Applications	
(a) Bargaining Agents Certified	109
(b) Applications Dismissed	125
(c) Applications Withdrawn	128
2. Applications under Section 1(4)	129
3. Application under Section 4 of the Successor Rights (Crown Transfers) Act, 1977	129
4. Applications for Declaration Terminating Bargaining Rights	129
5. Applications for Declaration that Strike Unlawful	130
6. Applications for Declaration that Lock-Out Unlawful	130
7. Applications For Consent to Prosecute	131
8. Complaints under Section 79 (Unfair Labour Practice)	131
9. Application under Section 39	135
10. Applications under Section 55	135
11. Jurisdictional Dispute	136
12. Applications For Determination under Section 95(2)	136
13. References to Board Pursuant to Section 96	136
14. Applications under Section 112a	137
15. Applications for Reconsideration of Board's Decision	138

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1978

BARGAINING AGENTS CERTIFIED DURING MAY

No Vote Conducted

2052-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kaneff Properties Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 2170 Sherobee Road, Mississauga, including resident superintendents, save and except property managers, persons above the rank of property managers, office and clerical staff." (12 employees in the unit).

0651-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. J. & M. Chartrand Realty Limited (Respondent).

Unit: "all employees of the respondent working within a fifty mile radius of the Timmins Federal Building employed in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (13 employees in the unit).

0831-77-R: Canadian Food and Associated Services Union (Applicant) v. Windsor Arms Hotel Limited (Respondent) v. International Beverage Dispensers' & Bartenders Union Local 280 (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, employed at the Windsor Arms Hotel, Noodles, and the Bay Street Car, save and except supervisors and assistant supervisors, persons above the rank of supervisor, front desk clerks, office staff, musicians, maitres d'hotel, assistant maitres d'hotel, captain waiters, chefs, sous-chefs, chefs de partis who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by a subsisting collective agreement between the respondent and Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders International Union, A.F. of L., C.I.O., C.L.C." (171 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

1493-77-R: Canadian Food and Allied Workers Local Union 175, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Dunnville Supermarkets Ltd. (Respondent).

Unit: "all employees of the respondent at Dunville, Ontario, save and except persons above the rank of assistant store manager, produce manager, bakery manager and head cashier-bookkeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit).

1494-77-R: Canadian Food and Allied Workers Local Union 633, Chartered by the Amalgamated

Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Dunnville Supermarkets Ltd. (Respondent).

Unit: "all meat department employees of the respondent at the retail store at Dunnville, Ontario, save and except meat manager, those above the rank of meat manager, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit).

1496-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Norfinch Construction (Toronto) Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1635-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Brampton Hydro-Electric Commission (Respondent) v. Canadian Union of Public Employees CLC, Ontario Hydro Employees Union Local 1000 (Intervener).

Unit #2: "all employees of the respondent engaged in the distribution and supply of power, save and except supervisory foreman, persons above the rank of supervisory foreman and office staff." (21 employees in the unit). (Bargaining Unit #1 – See Application under Section 55 to Post-Hearing Vote).

1694-77-R: Ontario Nurses' Association (Applicant) v. Kennedy Lodge Nursing Home (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at Kennedy Lodge Nursing Home, Scarborough, Ontario, save and except shift supervisors and those above the rank of shift supervisor, and persons regularly employed for not more than twenty-four hours per week." (38 employees in the unit).

1705-77-R: Canadian Union of Public Employees (Applicant) v. The Board of Management of the District of Thunder Bay Home for the Aged (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its Pinewood Court home for the aged in the City of Thunder Bay in the District of Thunder Bay, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate dietitians, student dietitians, technical personnel, craft teachers, supervisors and persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation periods or on a cooperative word-study programme." (25 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

1723-77-R: Alliance Employees' Union (Applicant) v. Public Service Alliance of Canada (Respondent) v. Ottawa Typographical Union, Local 102 (Intervener).

Unit: "all employees of the respondent employed in an administrative capacity in Ottawa, save and except elected and appointed officers of the respondent, employees of the respondent covered under a subsisting collective agreement with the Canadian Union of Labour Employees, employees of the respondent covered by a subsisting collective agreement with the intervener and employees of the re-

spondent employed in an administrative support capacity.” (40 employees in the unit). (*Having regard to the representations of the parties*).

1810-77-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Hamilton-Wentworth (Respondent).

Unit: “all employees of the respondent working at Wentworth Lodge in the Town of Dundas, save and except professional nursing staff, assistant supervisors, persons above the rank of assistant supervisor, office staff, technical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed pursuant to a co-operative training programme.” (90 employees in the unit).

1848-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Eureka Contractors (Windsor) Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America Local #494 (Intervener).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1877-77-R: Labourers’ International Union of North America, Local 607 (Applicant) v. Terra-Krete Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1920-77-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Hamilton-Wentworth (Respondent).

Unit: “all office and clerical employees of the respondent working at Wentworth Lodge, in the Town of Dundas, save and except professional nursing staff, supervisors, persons above the rank of supervisor, technical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed pursuant to a cooperative training program and students employed during school vacation periods.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1936-77-R: Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa – Hull (Applicant) v. Brunet Brothers Limited (Respondent) v. Employee (Objector).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent within the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1978) OLRB Rep. May).

2021-77-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Chi-Can Freight Forwarding Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen and dispatchers, persons above the rank of foreman and dispatchers, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

0013-78-R: Canadian Union of Public Employees (Applicant) v. Travelways School Transit Ltd. (Burlington Division) (Respondent).

Unit #1: "all employees of the respondent working at or out of the respondent's terminal at 5401 Dundas St. Burlington, save and except office and sales staff, dispatchers and persons above the rank of dispatcher, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent working at or out of the respondent's terminal at 5401 Dundas St. Burlington regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except office and sales staff, dispatchers, and persons above the rank of dispatcher." (122 employees in the unit). (*Having regard to the agreement of the parties*).

0017-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brunswick International Canada Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0018-78-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Casey-Hewson Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (00 employees in the unit).

0031-78R: United Steelworkers of America (Applicant) v. The Craig Bit Company Limited (Respondent).

Unit: "all employees of the respondent company at North Bay, save and except foreman, persons above the rank of foreman, office and sales staff." (88 employees in the unit).

0038-78-R: Canadian Union of Public Employees (Applicant) v. The Arnprior and District Memorial Hospital (Respondent).

Unit: "all employees of the respondent at Arnprior in the County of Renfrew, save and except professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, department heads, persons above the rank of department head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (66 employees in the unit). (*Having regard to the agreement of the parties*).

0085-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 88 Isabella Street, in

Metropolitan Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (3 employees in the unit).

0087-78-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. E. Dolar & Son Drywall & Acoustics Co. (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

0091-78-R: Teamsters Local Union No. 419 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. The Garth Company, Division of The Robert Mitchell Co., Limited (Respondent).

Unit: “all employees of the respondent working at Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

0202-78-R: Retail Clerks Union Local 409, chartered by the Retail Clerks International Union, CLC-AFL-CIO (Applicant) v. Birchwood Terrace Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit #1: “All employees of the respondent at Kenora, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor and foreman, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2 “all employees who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in the employ of the respondent at Kenora, save and except professional nursing staff, physiotherapists, occupational therapists, supervisor, foremen, persons above the rank of supervisor and foreman and office staff.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

0209-78-R: International Association of Machinists and Aerospace Workers (Applicant) v. CD Maintenance Services Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

0221-78-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Markham Market Place (Respondent).

Unit: “all employees of Markham Market Place employed in maintenance and cleaning at Markham Place in Thornhill, Ontario, save and except supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

0223-78-R: Ontario Nurses' Association (Applicant) v. The Board of Management of the District of Thunder Bay Home for the Aged (Respondent).

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by the respondent in the City of Thunder Bay, save and except the Director of Nursing and those persons above the rank of Director of Nursing." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0233-78-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 48 (Applicant) v. Cara Drywall Services (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – Report of full decision (1978) OLRB Rep. May).

0234-78-R: Christian Labour Association of Canada (Applicant) v. Shar-Dee Contracting Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0237-78-R: Hotels, Clubs, Restaurants, Tavern Employees' Union Local 261, Chartered by Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Beaver Foods Limited – Nutricare Division (Respondent).

Unit: "all employees of the respondent employed at the Riverside Hospital, 1967 Riverside Drive, Ottawa, save and except the manager, supervisors, persons above the rank of manager and supervisors, dietitians, student dietitians, graduate dietitians, chef and office staff." (52 employees in the unit).

0238-78-R: Association of Commercial & Technical Employees Local 1704 – Canadian Labour Congress (Applicant) v. Unemployment Help Centre (Respondent).

Unit: "all employees of the respondent in Metro Toronto." (3 employees in the unit).

0246-78-R: International Union of Operating Engineers, Local 793 (Applicant) v. C.A. Pitts General Contractor Limited (Respondent).

Unit: "all employees of the respondent working as instrumentmen, rodmen, chainmen and party chief in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except field engineer and persons above the rank of field engineer." (11 employees in the unit).

0252-78-R: Graphic Arts International Union, Local 12-L (Applicant) v. Centennial Printers (Peterborough) Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in Peterborough, save and except non-working foremen and persons above the rank of non-working foreman, and office and clerical staff." (5 employees in the unit). (*Having regard to the representations before it*).

0254-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. OPEC Acoustics & Drywall Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0264-78-R: United Steelworkers of America (Applicant) v. Sudbury Wide Telephone Answering Service (Respondent).

Unit: "all employees of the respondent in Sudbury, save and except supervisors and persons above the rank of supervisor." (15 employees in the unit).

0265-78-R: Labourers' International Union of North America, Local 493 (Applicant) v. Camston Toronto Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0266-78-R: Laborers' International Union of North America, Local 1081 (Applicant) v. Orlando Corporation (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0275-78-R: Association of Professional Student Services Personnel (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent).

Unit: "all phyco-educational consultants, psychologists, behavioural consultants, speech therapists, speech pathologists, family and community consultants, child care workers, social service workers, social workers, psychomatricians and all other employees of the respondent employed in a professional capacity related to psychology, social work counselling and related functions, save and except supervisors." (44 employees in the unit).

0276-78-R: Association of Professional Student Services Personnel (Applicant) v. Board of Education of Niagara South (Respondent) v. Ontario Secondary School Teachers, Federation and Ontario Secondary School Teachers' Federation District 7 (Intervener #1) v. The Ontario Public School Men Teachers' Federation (Intervener #2) v. Federation of Women Teachers' Associations of Ontario and Niagara South Women Teachers' Association (Intervener #3).

Unit: "all phychomatricians, psychologists, attendance counsellors and all other employees of the respondent employed in a professional capacity related to psychology, social work, counselling and related functions for not less than twenty-four hours per week, save and except supervisors, secretarial and clerical employees, teachers, as defined by the Collective Bargaining and Teachers Negotiating Act 1975 and students employed during the school vacation period and work experience periods." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0278-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Tomar Plastering Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0279-78-R: United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. J. C. Milne Construction Co. (Canada) Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0291-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Beckman-Gough Mechanical Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0292-78-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. K & L Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0100-78-R: Pharmacists and Professional Employees Association, Local Union 1976, chartered by: Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Green Acres Nursing Home owned and operated by Bellevilla Nursing Homes Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all persons regularly employed by the respondent at Sidney Township for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (30 employees in the unit).

0101-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041 (Applicant) v. Dominion Drywall Contractors (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

0111-78-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 785 and 2041 (Applicant) v. Cara Drywall Services (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

0115-78-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. FCM Division Gulf-Western (Canada) Ltd. (Respondent).

Unit: “all of the employees of the respondent at Windsor, Ontario save and except foremen, those above the rank of foreman, office and sales staff, laboratory technicians and security guards.” (8 employees in the unit).

0118-78-R: Canadian Union of Public Employees (Applicant) v. Michipicoten Board of Education (Respondent).

Unit #1: “all employees of the respondent employed in its maintenance, caretaking services and plant operation at the Township of Michipicoten in the District of Algoma, save and except the Maintenance Supervisor, persons above the rank of Maintenance Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (13 employees in the unit).

Unit #2: “all employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period employed by the respondent in its maintenance, caretaking services and plant operation at the Township of Michipicoten in the District of Algoma, save and except the Maintenance Supervisor and those persons above the rank of Maintenance Supervisor.” (3 employees in the unit).

0119-78-R: Canadian Union of Public Employees (Applicant) v. Michipicoten Board of Education (Respondent).

Unit: “all office, clerical and technical employees of the respondent at the Township of Michipicoten in the District of Algoma, save and except supervisors, persons above the rank of supervisor, confidential secretary to the Business Administrator, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (10 employees in the unit).

0123-78-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Capform Inc. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

0128-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Paris Poultry Products Limited (Respondent).

Unit: "all employees of the respondent at Paris, Ontario save and except for supervisors, forewomen and persons above the rank of supervisor and forewoman, office and sales staff and students hired during the school vacation period." (32 employees in the unit).

0131-78-R: Labourers' International Union of North America, Local 247 (Applicant) v. Capform Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0132-78-R: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Peerless Rug Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0136-78-R: International Molders & Allied Workers Union (Applicant) v. Control Cast Co. Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at London, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (13 employees in the unit).

0152-78-R: United Steelworkers of America (Applicant) v. Onaping Falls Food Limited (Respondent) v. Group of Employees (Objectors). **0153-78-R:** United Steelworkers of America (Applicant) v. Onaping Falls Food Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Levack, save and except foremen and persons above the rank of foreman." (16 employees in the unit). (*Having regard to the agreement of the parties*).

0154-78-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Morrison Lamothe Foods Limited, Bakery Division (Respondent).

Unit: "all employees of the respondent working at its Bakery Division in Ottawa, Ontario, save and except foremen, route supervisors, sales supervisors, persons above the rank of foreman, route supervisor or sales supervisor, office and clerical staff, including production control and quality control, employees of the order department, employees of the returned goods department, security guards, persons regularly employed for not more than 24 hours per week, students employed for the school vacation periods and employees covered by a subsisting collective agreement with Bakery and Confectionery Workers' International Union of America, Local 332." (64 employees in the unit). (*Having regard to the agreement of the parties*).

0155-78-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Rosy Construction Co. Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

0166-78-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Kipling Construction (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

0167-78-R: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Beamsville Steel Works Ltd. (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit). (*clarity note* – Report of full decision (1978) OLRB Rep. May).

0168-78-R: Service Employees Union, Local 204 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. West Lincoln and District Association for the Lincoln Developmental Centre (Respondent) v. Employees (Objectors).

Unit: “all employees of the Employer in its Lincoln Development Centre in Beamsville, Ontario, save and except office staff, foremen and supervisors, persons above the rank of foremen and supervisors, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements” (17 employees in the unit). (*Having regard to the agreement of the parties*).

0172-78-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent).

Unit: “all employees of the respondent at Windsor, Ontario save and except dispatchers, persons above the rank of dispatcher, office and sales staff.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

0177-78-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Domenic Masonry Contractor Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0181-78-R: Canadian Union of Public Employees (Applicant) v. The London Public Library Board (Respondent).

Unit: “all employees of the Respondent in London, Ontario, regularly employed for less than 17-1/2 hours per week, save and except the Director, Manager, Personnel Services, Curators, Co-ordinators, Department Heads, Business Administrator, Consultant Continuing Education and Community Rela-

tions, Superintendent of Buildings, Secretary to the Director, Secretary to the Manager Personnel Services Accountant, students hired for the school vacation period, pages and guides, and persons covered by the subsisting collective agreement between the Respondent and the London Library Employees Union, Local union 217, Canadian Union of Public Employees.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

0184-78-R: Canadian Chemical Workers Union (Applicant) v. Sheffield Bronze Powder Company Limited (Respondent).

Unit: “all employees of the Respondent at its plant in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

0185-78-R: International Beverage Dispensers’ and Bartenders’ Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Harved Hotel Enterprises Limited Known as: Commodore Tavern (Respondent).

Unit: “all full-time male and female bartenders, tapmen, waiters, waitresses, bar-boys, bus-boys and beerex waiters in the employ of the respondent in Metropolitan Toronto, save and except managers and persons above the rank of manager.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

0193-78-R: Canadian Union of Public Employees (Applicant) v. Country Place Nursing Homes Limited (Respondent).

Unit: “all employees of the Respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, office staff and employees covered by the subsisting collective agreement with the Canadian Union of Public Employees, Local 1854.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

0321-78-R: Labourers’ International Union of North America, Local 607 (Applicant) v. P. S. E. Mechanical (Respondent).

Unit: “all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

0331-78-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Camston Toronto Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2135-76-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Skeates Bros. Ltd. (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 18 (Intervener #2).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent in the cities of Hamilton, Burlington and Brantford and the area adjacent thereto and the Counties of Halton, Wentworth, Brant, Norfolk, Haldimand, and the Townships of Caister, North and South Grimsby in the County of Lincoln, save and except plasterers and plasterers’ apprentices employed on residential building projects, non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

Number of names of persons on revised voters’ list		3
Number of persons who cast ballots	3	
Ballots segregated and not counted	0	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener #1	0	

2136-76-R: Labourers’ International Union of North America, Local 837 (Applicant) v. P. J. Daly Plastering Contracting Ltd. (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 18 (Intervener #2).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent in the cities of Hamilton, Burlington and Brantford and the area adjacent thereto and the Counties of Halton, Wentworth, Brant, Norfolk, Haldimand, and the Townships of Caister, North and South Grimsby in the County of Lincoln, save and except plasterers and plasterers’ apprentices employed on residential building projects, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

Number of names of persons on revised voters list		4
Number of persons who cast ballots	4	
Ballots segregated and not counted	1	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener #1	0	

1952-77-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Belmont Concrete Finishing Co. Ltd. (Respondent) v. The General Contractors’ Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada (Intervener #2). (*Certified*).

- and -

2019-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Belmont Concrete Finishing Co. Ltd. (Respondent) v. The General Contractors’ Section of the Toronto Construction Association (Intervener #1) V. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #2). (*Dismissed*).

Unit: “all cement masons and cement masons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foreman.” (00 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	12	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour applicant Local 506	9	
Number of the ballots marked in favour of Intervener #2 Local 598	1	

0005-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Emilio Pompilio Ltd. (Respondent) v. Local 598, of the Operative Plasterers and Cement Mason International Association of the United States and Canada (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

0022-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. United Floor Co. Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Certified*).

0040-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. United Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Dismissed*).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	4	
Ballots segregated and not counted	4	
Number of ballots marked in favour of applicant Labourers Local 506	3	
Number of ballots marked in favour of applicant Local Local 183	1	
Number of ballots marked in favour of intervener #2	0	

0044-78-R: Graphic Arts International Union, London Local 517 (Applicant) v. Hunter Printing London Limited (Respondent) v. London Commercial and Paper Box Workers Union Local P510 (Intervener).

Unit: "all employees employed by the respondent in the City of London, save and except non-working foremen, persons above the rank of non-working foremen, office and sales staff and employees by subsisting collective agreements with the Graphic Arts International Union, Local 517." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons of list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	0	

0065-78-R: Canadian Chemical Workers Union (Applicant) v. Northern and Central Gas Corporation Limited (Respondent) v. International Chemical Workers' Union, Local 953 (Intervener).

Unit: "all employees of the respondent in its service area from Port Hope to Cornwall, save and except foremen, persons above the rank of foreman, sales and office staff." (33 employees in the unit).

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	34	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	31	
Number of ballots marked in favour of intervener	2	

Applications Certified Subsequent to Post-Hearing Vote

1156-77-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #210 (Applicant) v. F. Lepper & Son Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of F. Lepper & Son Ltd. in the Town of Napanee, save and except foremen, persons above the rank of foreman, office staff and students employed during the school vacation period." (28 employees in the unit).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	43	
Ballots segregated and not counted	5	
Number of ballots marked in favour of applicant	27	
Number of ballots marked against applicant	11	

1487-77-R: Retail, Wholesale and Department Store Union, AFL:CIL:CLC (Applicant) v. Kitchens of Sara Lee (Canada) Ltd. (Respondent).

Unit: "all production and maintenance employees of the respondent at its plant in the City of Brampton who are regularly employed for not more than twenty-four hours per week, save and except foremen, forewomen, persons above the rank of foreman, professional employees, engineers, draftsmen, office and sales staff, retail clerks and students employed during the school vacation period." (38 employees in the unit).

Number of names of persons on list as originally prepared by employer		54
Number of persons who cast ballots	43	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	38	
Number of ballots marked against applicant	5	

1699-77-R: International Union of Doll & Toy Workers of the United States & Canada, Local 905 (Applicant) v. Coles Book Stores Limited (Respondent).

Unit: "All employees of the respondent at its warehouse in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (25 employees in the unit).

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots	34	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	13	

1868-77-R: International Union of Electrical, Radio and Machine Workers - AFL-CIO-CLC (Applicant) v. Dictaphone Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all service technicians and systems specialists in the employ of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	6	

1950-77-R: Canadian Union of Public Employees (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of VS Services Ltd. at the Barton Place Nursing Home in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except managers, supervisors, persons above the rank of managers, supervisors, chef and dietitian." (17 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	2	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1307-76-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Sherman Sand and Gravel Ltd. (Respondent). (73 employees).

2143-76-R: Labourers' International Union of North America, Local 873 (Applicant) v. Arthur G. McKee Company of Canada Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener). (18 employees).

1646-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Canadian Red Cross Society Blood Transfusion Service (Respondent) v. Canadian Red Cross Blood Transfusion Service Employees Association (Intervener). (217 employees).

1767-77-R: Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for the Mentally Retarded (Respondent) v. Employees (Objectors). (76 employees).

0019-78-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Riverside Roofing Limited (Respondent) v. Sheet Metal Workers' International Association, Local Union 235 (Intervener). (5 employees).

0086-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ellis-Don Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener #1) v. The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Intervener #2). (4 employees).

0093-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Concrete Columns Clamps (1961) Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener). (2 employees).

0170-78-R: Service Employees International Union – Local 183 (Applicant) v. Central Park Loges of Canada (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, occupational and physiotherapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting agreements with Local 183 S.E.I.U." (26 employees in the unit). (*Having regard to the agreement of the parties*).

0179-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Alberts Concrete Floor Finishing Company (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. The General Contractors' Section of The Toronto Construction Association (Intervener #2). (7 employees).

0191-78-R: Labourers' International Union of North America, Local 837 (Applicant) v. Cooper Construction Company Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener). (3 employees).

0196-78-R: Local 598 of the Operative Plasterers' and Cement Masons' Association of the United States and Canada (Applicant) v. Vanguard Floors Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Labourers' International Union of North America, Local 506 (Intervener #2) v. Labourers' International Union of North America, Local 183 (Intervener #3). (31 employees).

0217-78-R: Field Price Limited Employees' Association (Applicant) v. Field Price Limited (Respondent) v. Local 92, of International Molders' and Allied Workers Union (Intervener). (5 employees).

0230-78-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Canadian Cannery Limited (Respondent). (4 employees).

0253-78-R: London and District Service Workers' Union, Local 220, S.E.I.U. (Applicant) v. The Waterloo County Roman Catholic Separate School Board (Respondent). (2 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1849-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Structural Floor Finishing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial, and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (25 employees).

Number of names of persons of revised voters' list		25
Number of persons who cast ballots		18
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener #2	14	

1993-77-R: United Paperworkers International Union (Applicant) v. The Great Lakes Paper Company, Limited (Respondent) v. The Canadian Paperworkers Union and its Local 257 (Intervener).

Voting Constituency: "All employees of the respondent at Thunder Bay, Ontario, save and except assistant paper machine superintendent, persons above the rank of assistant paper machine superintendent." (167 employees). (*clarity note* – see Report of full decision (1978) OLRB Rep. May).

Number of names of persons on revised voters' list		167
Number of persons who cast ballots		153
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	44	
Number of ballots marked in favour of intervener	107	

2023-77-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. The Board of Governors of the Hamilton Civic Hospitals (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener).

Voting Constituency: "All stationary engineers and maintenance personnel employed by the respondent at its Hamilton General Hospital and Henderson General Hospital in the City of Hamilton, Ontario, save and except assistant chief engineers, persons above the rank of assistant chief engineer, maintenance supervisors and those employees covered by subsisting collective agreements between the respondent and Canadian Union of Public Employees Local 794 and Ontario Nurses Association." (44 employees).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant	15	
Number of ballots marked in favour on intervener	27	

0042-78-R: Canadian Paperworkers Union (Applicant) v. Ontario-Minnesota Pulp and Paper Company Limited (Respondent) v. Local 92 of the United Paperworkers International Union (Intervener).

Voting Constituency: "All employees of the Company at Fort Frances, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff and employees covered by Unions other than Local 92 of the United Paperworkers International Union." (510 employees).

Number of names of persons on list as originally prepared by employer		513
Number of persons who cast ballots	422	
Ballots segregated and not counted	11	
Number of ballots marked in favour of applicant	54	
Number of ballots marked in favour of intervener	357	

0064-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis – Don Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	5	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener #2	4	

Certification Dismissed Subsequent to Post-Hearing Vote

1945-77-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Alliance Hotel Company Limited carrying on business as the Whitby Hotel (Respondent) v. Group of Employees (Objectors).

Unit: "all full-time and part-time male and female tapmen and bartenders, waiters and waitresses, doormen, barboys and improvers employed by the respondent at the Whitby Hotel, save and except manager, persons above the rank of manager, and office staff." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0084-78-R: Hotel & Restaurant Employees & Bartenders International Union, Local 604, A.F. of L., C.L.C. & C.I.O. (Applicant) v. Beaver Foods Limited (Respondent). (60 employees).

0124-78-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Cap-form Incorporated (Respondent). (6 employees).

0190-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. J. McBride and Sons Ltd. (Respondent). (4 employees).

0192-78-R: Canadian Union of Operating Engineers and General Workers Local 100 (Applicant) v. Richelieu Inn (Respondent). (55 employees).

0204-78-R: Hotels, Clubs, Restaurants, Tavern Employees' Union Local 261, chartered by Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Holiday Inn of Ottawa-Centre of the Commonwealth Holiday Inns of Canada Limited, 100 Kent Street, Ottawa, Ontario (Respondent). (4 employees).

0227-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. York-Hannover Developments Ltd. (Respondent). (4 employees).

0228-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. York-Hannover Developments Ltd. (Respondent). (2 employees).

0229-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. York-Hannover Developments Ltd. (Respondent). (2 employees).

APPLICATIONS UNDER SECTION 1(4)

1272-77-R: United Steelworkers of America (Applicant) v. Crown Cork & Seal Company Limited and Crown Cork & Seal Company, Inc. (Respondents). (*Withdrawn*). (2 employers).

1901-77-R: Retail, Wholesale and Department Store Union, Local 414 (Applicant) v. Canteen of Canada Limited and Walfoods Limited (Respondent) v. Hotel and Restaurant Employees and Bartenders' International Union, Restaurant, Cafeteria and Tavern Employees Union, Local 254 (Intervener). (2 employers).

APPLICATION UNDER SECTION 4 OF THE SUCCESSOR RIGHTS (CROWN TRANSFERS) ACT, 1977

0249-78-R: Ontario Public Service Employees Union (Applicant) v. Owen Sound General and Marine Hospital (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0140-77-R: Frank Newbold and Stanley Ofrecht (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L.-C.I.O.-C.L.C. (Respondent) v. Custom Aggregates (Intervener). (12 employees). (*Withdrawn*).

1829-77-R: Winston Roberts (Applicant) v. International Association of Machinists and Aerospace Workers, Local Lodge 235 (Respondent). (120 employees). (*Dismissed*).

1887-77-R: The Employees of Shakell Electric & Refrigeration, 15 Matchedash St. N. Orillia (Applicant) v. Local 1739 International Brotherhood of Electrical Workers, Barrie, Ontario (Respondent). (3 employees). (*Granted*).

0001-78-R: The Employees of Benson Hotel Ltd. (namely Mrs. Beverly Mason) (Applicant) v. Hotel and Restaurant Employees & Bartenders Local 604 (Respondent). (3 employees). (*Dismissed*).

0041-78-R: Alcide Poirier (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent). (4 employees). (*Dismissed*).

0112-78-R: Beatrice Robinson (Applicant) v. Canadian Union of Public Employees, Local 2088 (Respondent). (13 employees). (*Granted*).

0116-78-R: Halton Centennial Manor Regional Municipality of Halton (Applicant) v. Canadian Union of Public Employees (Respondent). (26 employees). (*Dismissed*).

0156-78-R: John Hackett (Applicant) v. International Woodworkers of America (Respondent). (32 employees). (*Dismissed*).

1977-78-R: The Employees of Benson Hotel Ltd. (namely James Dellow & Beverley Mason) (Applicant) v. Hotel and Restaurant Employees & Bartenders Local 604 (Respondent). (3 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0255-78-U: Domglas Ltd. (Applicant) v. United Glass and Ceramic Workers of North America, and its Locals 203 and 258, C. Bigley, and those persons named in Schedule "A" (Respondents). (*Withdrawn*).

0277-78-U: Canadian Engineering and Contracting Co. Limited (Applicant) v. Hugh Kerrigan (Respondent). (*Withdrawn*).

0305-78-U: Arthur G. McKee and Company of Canada Limited (Applicant) v. P. Adams, et. al. (Respondents). (*Granted*).

0306-78-U: Firestone Steel Products of Canada (Applicant) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America; and its Local 27, Unit 17, Mr. A. Seymour; and those persons named in Schedule "A" (Respondents). (*Dismissed*).

0308-78-U: Eaman-Riggs Limited (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, P. Adams, et. al. (Respondents). (*Granted*).

0315-78-U: Dewar Insulations Inc. (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, and Eugene Acs, et. al. (Respondents). (*Granted*).

0320-78-U: Canadian Johns Manville Co. Ltd. (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, and J. Clare, B. Cote, P. Cote, R. Clements, J. Cyr, B. Hutcheson, F. Loricchio, G. Lemonde, F. Lavigne, B. McMurter, O. Mindle, J. Pauline, F. Pelaez, J. St. Jean, W. Sullivan, J. Teal, G. Twin, and P. Unkersov (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1786-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. A. C. Khan Janitorial Services Ltd., A & C Janitorial Services Limited, A. & C. Management Services, AC Khan Janitorial Service, A.C. Maintenance Service Ltd., A. & C. Khan Janitorial Services Limited and Ackbar Khan (Respondents). (*Withdrawn*).

1801-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. A.C. Khan Janitorial Services Ltd. A & C Janitorial Services Limited, A. & C. Management Services, AC Khan Janitorial Service, A.C. Maintenance Service Ltd. A. & C. Khan Janitorial Services Limited, Ackbar Khan Gaza Investments Limited carrying on business as Tuxedo Court Apartments, and David Bertrand (Respondents). (*Withdrawn*).

1895-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. A.C. Khan

Janitorial Services Ltd., A & C Janitorial Services Limited, A. & C. Management Services, AC Khan Janitorial Service, A.C. Maintenance Service Ltd. A. & C. Khan Janitorial Services Limited, Gaza Investments Limited carrying on business as Tuxedo Court Apartments, Ackbar Khan and David Bertrand (Respondents). (*Withdrawn*).

0235-78-U: Pharmacists and Professional Employees Association, Local Union 1976, Chartered by: Retail Clerks International Union, CLC, AFL-CIO (Applicant) v. Hillsdale Nursing Home (Respondent). (*Withdrawn*).

0327-78-U: Labourers' International Union of North America, Local 183 (Applicant) v. York-Hanover Developments Ltd., John Holgate, Gabor Prezner, Christine Swabey, R. Bendal, G. Derash, K. Descham, W. Walker and Evangelos Marantos, carrying on business as Perfect Metro Cleaners (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1240-77-U: International Woodworkers of America, Local 2-337 (Applicant) v. Consolidated-Bathurst Packaging Ltd. (Respondent). (*Dismissed*).

0097-78-U: Nairn Centre Sawmill Workers' Union (Applicant) v. Robert Gordon (Respondent). (*Withdrawn*).

0144-78-U: Office and Professional Employees International Union, Local No. 81 (Applicant) v. Canadian Car Division, Hawker Siddeley Canada Ltd. (Respondent). (*Dismissed*).

0183-78-U: Ontario Public Service Employees Union, Local 110 (Applicant) v. Council of Regents and J. A. Colvin, President of Fanshawe College (Respondents). (*Withdrawn*).

0295-78-U: International Ladies' Garment Workers' Union (Applicant) v. Trojan Sportswear Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1972-76-U: Ciril Iskra (Complainant) v. Local 252 U.A.W. (Respondent). (*Dismissed*).

0002-77-U: United Steelworkers of America (Complainant) v. Kodak Canada Ltd. (Respondent). (*Terminated*).

1048-77-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. The Becker Milk Company Limited (Respondent).

- and -

1049-77-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Ind-Ex Distributors Limited (Respondent). (*Granted*).

1223-77-U: Barbara A. Young (Complainant) v. Toronto Typographical Union, No. 91, I.T.U. and Howarth & Smith Limited (Respondents). (*Dismissed*).

1617-77-U: United Garment Workers of America (Complainant) v. Abbey Crest Limited (Respondent). (*Dismissed*).

1641-77-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. C. E. B. Limited (Respondent). (*Granted*).

1656-77-U: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Dorset Food Products Ltd (Respondent). (*Granted*).

1709-77-U: United Steelworkers of America (Complainant) v. Trent Metals Ltd. (*Respondent*).
- and -

1770-77-U: United Steelworkers of America (Complainant) v. Trent Metals Ltd. (*Respondent*).
- and -

1771-77-U: United Steelworkers of America (Complainant) v. Trent Metals Ltd. (*Respondent*). (*Withdrawn*).

1755-77-U: Lloyd A. Scott (Complainant) v. International Chemical Workers Union, Local 880 (Respondent). (*Dismissed*).

1804-77-U: Roy Jeffery (Complainant) v. Canadian Union of Public Employees Local 1176 (Respondent). (*Dismissed*).

1853-77-U: Stanley Edward Hruboska (Complainant) v. Local Union 105 I.B.E.W. Hamilton, Ont. (Respondent). (*Dismissed*).

1854-77-U: David Smith (Complainant) v. I.B.E.W. Local Union 105 Hamilton, Ontario (Respondent). (*Dismissed*).

1855-77-U: Jack Brizland (Complainant) v. I.B.E.W. Local Union 105, Hamilton, Ont. (Respondent). (*Dismissed*).

1857-77-U: Bakery & Confectionery Workers' International Union of America, Local 264 (Complainant) v. Sandra Instand Coffee Company Limited (Respondent). (*Dismissed*).

1872-77-U: Deolinda Fernandes (Complainant) v. Canadian Food and Allied Workers Local P. 1116 (Respondent) v. United Co-operatives of Ontario (Intervener). (*Dismissed*).

1902-77-U: Retail, Wholesale and Department Store Union, Local 414 (Complainant) v. Canteen of Canada Limited (Respondent). (*Withdrawn*).

1918-77-U: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 (Complainant) v. A.N. Shaw Restoration Ltd., and Peter F. Baggeley (Respondents). (*Granted*).

1943-77-U: Tonino Filice (Complainant) v. Local 105 I.B.E.W. Hamilton (Respondent). (*Dismissed*).

0012-78-U: Martin Malonowich (Complainant) v. International Union of Operating Engineers (Respondent). (*Withdrawn*).

0029-78-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. E. C. King Contracting Co. Ltd. (Respondent). (*Withdrawn*).

0045-78-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Taberna Holdings Ltd., Known as: Paramount Tavern (Respondent). (*Withdrawn*).

0098-78-U: Nairn Centre Sawmill Workers' Union (Complainant) v. Robert Gordon (Respondent). (*Withdrawn*).

0117-78-U: Ontario Nurses' Association (Complainant) v. Extendicare Ltd., North York (Respondent). (*Withdrawn*).

0122-78-U: Canadian Union of Public Employees (Complainant) v. Art Gallery of Ontario (Respondent). (*Withdrawn*).

0126-78-U: United Brotherhood of Carpenters and Joiners of America, AFL, CIO-CLC (Complainant) v. Premium Forest Products Limited (A Division of Dragoon Investments) (Respondent). (*Withdrawn*).

0127-78-U: Ron Dadouch (Complainant) v. Ontario Public Service Union Representative (Respondent). (*Dismissed*).

0135-78-U: United Steelworkers of America (Complainant) v. Acmetrack Limited (Respondent). (*Withdrawn*).

0147-78-U: Ontario Nurses' Association (Complainant) v. Lady Minto Hospital, Cochrane (Respondent). (*Withdrawn*).

0148-78-U: Ontario Public Service Employees Union (Complainant) v. Windsor Western Hospital (Respondent). (*Withdrawn*).

0149-78-U: Allan O'Brien (Complainant) v. Stan Petronski, and the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local #128 (Respondent). (*Withdrawn*).

0164-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 89, U.A.W. (Complainant) v. Reflex Division of International Tools (1973) Limited (Respondent). (*Withdrawn*).

0215-78-U: Hotel & Restaurant Employees & Bartenders Union, Local 604, AFL., CIO., & CLC. (Complainant) v. Churchill Restaurant Limited (Respondent). (*Withdrawn*).

0239-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 240, U.A.W. (Complainant) v. National Auto Radiator Manufacturing Company Limited (Respondent). (*Withdrawn*).

0243-78-U: Brian McCormick (Complainant) v. Provincial Electronic Distributors Limited (Respondent). (*Withdrawn*).

0256-78-U: Mr. Tom Roberts (Complainant) v. The Ontario Public Service Employees Union (Respondent). (*Withdrawn*).

0257-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Complainant) v. Mohawk Industries (Respondent). (*Dismissed*).

0259-78-U: The International Beverage Dispensers' and Bartenders Union Local 280 of the Hotel and Restaurant Employees' and Bartenders International Union A.F.L. C.I.O. C.L.C. (Complainant) v. Organ Grinder Ltd. known as Organ Grinder Tavern (Respondent). (*Withdrawn*).

0269-78-U: Trillium Villa Nursing Home (Complainant) v. London and District Service Workers' Union Local 220 and John Askin (Respondent). (*Withdrawn*).

0296-78-U: International Ladies' Garment Workers' Union (Complainant) v. Trojan Sportswear Limited (Respondent). (*Withdrawn*).

0304-78-U: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. The Martin-Brower Company, Division of The Clorox Company of Canada (Respondent). (*Withdrawn*).

0307-78-U: Teamsters Union Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Walloy Excavating Limited (Respondent). (*Withdrawn*).

0317-78-U: Graphic Arts International Union, Local 35-P (Complainant) v. Roto-Tone Gravure Service Limited (Respondent). (*Withdrawn*).

0318-78-U: Graphic Arts International Union Local 35-P (Complainant) v. Graphic Cylinders Incorporated (Respondent). (*Withdrawn*).

0325-78-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. T. M. L. Distributors Ltd. (Respondent). (*Withdrawn*).

0341-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

0342-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

0343-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Complainant) v. Green Acres Nursing Home, Montgomery Lodge, and Belleville Nursing Homes Inc. (Respondent). (*Withdrawn*).

0344-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

0345-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

0346-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.O.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

0347-78-U: Local Union 1976, Pharmacists and Professional Employees Association, chartered by the Retail Clerks International Union, C.L.C., A.F.O.-C.I.O. (Complainant) v. Green Acres Nursing Home (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

1732-77-M: Bert Ferwerda (Applicant) v. London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondent Trade Union) v. Chateau Gardens (London) Inc. (Respondent Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0842-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. General Contractors Section of the Toronto Construction Association; Valentine Enterprises Contracting, also known as Valentine Enterprises, Valentine Enterprises Contracting Limited, also known as Valentine Enterprises; Valentine Developments Limited; Valentine Developments; Burnham Glen Estates; Sabatino Contracting Company Limited; and Valentine Partnership (Respondents). (*Granted*).

1635-77-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Brampton Hydro-Electric Commission (Respondent) v. Canadian Union of Public Employees CLC, Ontario Hydro Employees Union Local 1000 (Intervener).

Unit #1: "all employees of the respondent engaged in the distribution and supply of power, save and except supervisory foreman, persons above the rank of supervisory foreman and office staff."

Number of names of persons of list as originally prepared by employer		21
Number of persons who cast ballots		20
Number of ballots marked in favour of applicant	19	
Number of ballots marked in favour of intervener	1	

(Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted).

1702-77-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Norjohn Contracting Limited (Respondent). (*Dismissed*).

1769-77-R: Service Employees Union, Local 268 (Applicant) v. Thunder Bay Ambulance Services Inc. (Respondent). (*Granted*).

0271-78-R: United Steelworkers of America (Applicant) v. Outboard Marine Corporation of Canada Ltd., and 377891 Ontario Limited (Respondents). (*Granted*).

JURISDICTIONAL DISPUTE

1582-77-JD: Corporation of the City of Thunder Bay (Complainant) v. Canadian Union of Public Employees, Local 87 International Brotherhood of Electrical Workers, Local Union 339 (Respondents). (*Granted*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1311-77-M: Canadian Union of Public Employees Local 87 (Applicant) v. The Corporation of the City of Thunder Bay (Respondent).

1407-77-M: The Corporation of the City of London (Applicant) v. Canadian Union of Public Employees, Local Union No. 101 (Respondent).

1611-77-M: Plainfield Children's Home (Applicant) v. Retail Clerks International Union (Respondent). (*Withdrawn*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

1561-77-M: Abbey Crest Limited (Employer) v. United Garment Workers of America (Trade Union). (*Terminated*).

0002-78-M: Westfort Hotel (Employer) v. Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union, Local 757 (Trade Union).

APPLICATIONS UNDER SECTION 112A

0954-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. General Contractors Section of the Toronto Construction Association; Valentine Enterprises Contracting, also known as Valentine Enterprises, Valentine Enterprises Contracting Limited, also known as Valentine Enterprises; Valentine Developments Limited; Valentine Developments; Burnham Glen Estates; Sabatino Contracting Company Limited; and Valentine Partnership (Respondents)

- and -

0961-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. General Contractors Section of the Toronto Construction Association; Valentine Enterprises Contracting, also known as Valentine Enterprises, Valentine Enterprises Contracting Limited, also known as Valentine Enterprises; Valentine Developments Limited; Valentine Developments; Burnham Glen Estates; Sabatino Contracting Company Limited; and Valentine Partnership (Respondents). (*Granted*).

1373-77-M: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Metropolitan Toronto Residential Painting Contractors Association and Bermann and Son Painting Contractors (Respondents). (*Granted*).

1800-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders' Association and Campeau Corporation (Respondents). (*Dismissed*).

1871-77-M: Sheet Metal Workers' International Association Local Union 397 (Applicant) v. Westeel-Rosco Limited (Respondent). (*Withdrawn*).

0134-78-M: Labourers' International Union of North America, Local 183 (Applicant) v. New Fly Forming Ltd. (Respondent). (*Granted*).

0163-78-M: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Ellis General Contractors (Respondent). (*Withdrawn*).

0187-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Wexford Plumbing & Heating Co. Ltd. and The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors Association of Toronto (Respondent). (*Withdrawn*).

0188-78-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Humber Industrial Installations Ltd., and The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors Association of Toronto (Respondent). (*Granted*).

0250-78-M: The Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Michael Bros. Excavating A Division of/or operated by Royal Excavating and Grading Limited (Respondent). (*Withdrawn*).

0281-78-M: Teamsters' Local Union No. 230, Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Giuseppe Alfano and Sons Ltd., carrying on business as Ontario Paving (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1478-77-R: Canadian Textile and Chemical Union (Applicant) v. Harding Carpets Limited, Collingwood, Ontario (Respondent) v. Amalgamated Clothing and Textile Workers Union (Intervener). (*Dismissed*). (*Request Denied*).

1102-77-U: Consolidated-Bathurst Packaging Ltd. (Applicant) v. International Woodworkers of America, Local 2-337 (hereinafter called IWA, Local 2-337), Verne Warren and Gary Lazenby (Respondent). (*Prosecution*). (*Request Denied*).

Government
Publications

BINDING SECT. OCT 14 1980

Government
Publications



3 1761 11467522 6